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In the Supreme Court of the United States

October Term, 1988

COMMONWEALTH OF PENNSYLVANIA,
PUBLIC UTILITY COMMISSION,
Petitioner

vs.

NATIONAL RAILROAD PASSENGER
CORPORATION

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

LINDA C. SMITH*
Assistant Counsel
SUSAN D. COLWELL
Assistant Counsel
JOHN B. WILSON
Deputy Chief Counsel
Daniel P. Delaney
Chief Counsel
Counsel for Petitioner,
Pennsylvania Public Utility
Commission
**Counsel of Record*

Commonwealth of Pennsylvania
Public Utility Commission
G-31, North Office Building
Harrisburg, PA 17120
(717) 783-2840

Dated: September 2, 1988

Murrelle Printing Co., Box 100, Sayre, Pa. 18840—(717) 888-2244

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STATEMENT OF QUESTION PRESENTED FOR REVIEW

Whether the exemption from "taxes" afforded Amtrak by 45 U.S.C. §546b is so unlimited as to prohibit the states from exercising their police power by requiring Amtrak to bear its fair share to repair or replace an unsafe bridge used by Amtrak, passengers of its lessees and the public?

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IN THE SUPREME COURT OF THE UNITED STATES

COMMONWEALTH OF PENNSYLVANIA, PUBLIC UTILITY COMMISSION,

Petitioner

vs.

NATIONAL RAILROAD PASSENGER CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The Commonwealth of Pennsylvania, Public Utility Commission, the Petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above-entitled case on June 6, 1988, *as amended*, on June 21, 1988.

REFERENCE TO OPINIONS DELIVERED IN THE COURTS BELOW

The Opinion of the United States Court of Appeals for the Third Circuit is reported at 848 F.2d 436 (3d Cir. 1988) and is printed in Appendix A. The judgment of the United States Court of Appeals for the Third Circuit has been stayed pending this Petition. The Judgment of the United States District Court for the Eastern District of Pennsylvania is printed in Appendix B. The order of the Pennsylvania Public Utility Commission is printed in Appendix C. The Recommended Decision of the Administrative Law Judge of the Pennsylvania Public Utility Commission is printed in Appendix E.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit (Appendix A) was entered on June 6, 1988, *as amended*, June 21, 1988. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. §1254(1).

STATUTE INVOLVED

The Supplemental Appropriations Act of 1982, Public Law 97-257, 96 Stat. 852-53 (1982) states in pertinent part:

> Notwithstanding any other provision of law, the National Railroad Passenger Corporation (the "Corporation") shall be exempt from any taxes or other fees imposed by any State, political subdivision of the State, or local taxing authority which are levied on the Corporation, or any railroad subsidiary thereof, from and after October 1, 1981, including such taxes and fees levied after September 30, 1982: *Provided, however,* That notwithstanding any provision of law, the Corporation shall not be exempt from any taxes or other fees which it is authorized to pay as of the date of the enactment of this provision. Taxes and fees levied on the Corporation or any railroad subsidiary thereof by States, political subdivisions of States, or local taxing authorities with respect to periods beginning prior to October 1, 1981, shall be payable in proportion to the part of the relevant tax period which elapsed prior to such date. Notwithstanding the provision of 28 U.S.C. §1341, the United States district courts shall have original jurisdiction over any civil actions brought by the Corporation to enforce the exemption conferred hereunder and may grant equitable or declaratory relief as requested by the Corporation. (Emphasis in original.)

(Pub. L. 97-257, Title I, § 108, Sept. 10, 1982, 96 Stat. 852.)

STATEMENT OF THE CASE

This case concerns the police power authority of states to allocate the costs of safety-related highway and railroad crossing improvements to the entities that benefit directly from these improvements. The case began as an investigation by the Commonwealth of Pennsylvania, Public Utility Commission (PUC) into the structural adequacy of the bridge carrying Cassatt Avenue over the tracks of the National Railroad Passenger Corporation (Amtrak), partly in Tredyffrin Township (Township) and partly in Easttown Township, Chester County, Pennsylvania. The railroad right-of-way and four sets of railroad tracks under the bridge are owned by Amtrak, which operates thirty-three (33) trains per day on those tracks. Consolidated Rail Corporation (Conrail) operates 28 freight trains per day at speeds up to 50 miles per hour. Southeastern Pennsylvania Transportation Authority (SEPTA) operates 71 passenger trains per day on these tracks. Both Conrail and SEPTA operate under agreement with Amtrak. The passenger trains travel at speeds up to 70 miles per hour.

The Cassatt Avenue bridge was built by the Pennsylvania Railroad around the turn of the century. The Pennsylvania Railroad also maintained the structure. In the mid-70s, Amtrak became the successor in interest to the rail passenger portion of the Pennsylvania R.R. Amtrak owns the train station east of the bridge, which serves Amtrak passengers and local commuters, and Amtrak's catenary for its electrification is attached to the underside

of the bridge. A train station west of the bridge is used by SEPTA passengers.

By emergency order issued by the PUC on February 25, 1981, the bridge was closed to vehicular traffic. At a site conference held March 11, 1981, Amtrak agreed to make repairs necessary to reopen the structure, and the PUC instituted a formal investigation into the structural adequacy and load-carrying capacity of the bridge on April 3, 1981 (PUC Docket No. I-810347). Following Amtrak's repairs to the bridge, the PUC ordered the structure to be reopened with a weight limitation of three tons. A hearing before an Administrative Law Judge (ALJ) was held on July 21, 1981, for the purpose of gathering information on the Cassatt Avenue bridge. The ALJ's Recommended Decision acknowledged progressive deterioration of the structure which would be quickened by continued use by vehicular traffic. The ALJ recommended closing the bridge to vehicles in order to keep it open for pedestrians for a longer time. The ALJ further recommended that Amtrak, as the owner of the line involved, should be assigned future maintenance of the bridge, with the exception of the sidewalks.

The Township and some of its individual residents filed Exceptions and a Petition to Intervene, but the PUC adopted the Recommended Decision on January 8, 1982. Pursuant to this order, the bridge was closed on March 26, 1982. Although the record was closed on May 3, 1982, the Conestoga-Woodlea Civic Association and a local corporation requested amendment of the order and reopening of the record. The Commission granted the request to reopen and ordered another evidentiary hearing, which was held on September 21, 1982.

The PUC order, adopted March 18, 1983, following the hearing ordered Amtrak to conduct an in-depth inspection of the structure within 60 days. A further hearing to discuss the inspection was held on February 28, 1984. By order adopted July 20, 1984, the PUC ordered the Pennsylvania Department of Transportation (PennDOT) to prepare construction plans for a replacement bridge within six months. This order was amended on November 16, 1984 to order the Township to prepare the plans. The Township submitted two sets of preliminary construction plans on July 15, 1985. A hearing to discuss these plans was held on January 14, 1986. The ALJ's Initial Decision resulting from this hearing was issued on April 11, 1986. The ALJ recommended replacement of the existing bridge with two new structures, one for vehicular traffic and one for pedestrians. The ALJ recommended further that the Township bear 80% of the design and construction costs, and that Amtrak pay the remaining 20%. Amtrak was also assigned future maintenance of the substructure of both bridges and the superstructure of the pedestrian bridge.

Amtrak filed exceptions to the Recommended Decision alleging that the Supplemental Appropriations Act of 1982 (45 U.S.C. §546b) bars the PUC from allocating any costs of repair, replacement or maintenance of the new structures because such costs are "taxes" from which Amtrak is specifically exempted.

On May 30, 1986, the PUC adopted the Recommended Decision with modifications not pertinent here. The Order, entered June 13, 1986, has not been appealed.

The administrative proceedings were held under the Pennsylvania Public Utility Code, 66 Pa. C.S.A. §2702, which empowers the PUC to determine and, in the exercise of police power, to order the manner in which

crossings of rail and highway facilities are constructed, altered, relocated, maintained or abolished, and to decide which party or parties should perform the necessary work as well as which party or parties should bear the cost and in what proportion.

On September 10, 1986, Amtrak filed a Complaint in the United States District Court for the Eastern District of Pennsylvania, requesting equitable and declaratory relief to invoke the provisions of 45 U.S.C. §546b and to prevent the enforcement of the PUC's cost allocation against Amtrak. The PUC and Township filed Answers, and Amtrak moved for summary judgment. The PUC and Township also filed motions for summary judgment, asserting that the PUC allocation of costs is not a "tax or other fee" within the meaning of the federal statute.

The District Court issued its Memorandum and Order dated June 30, 1987, which granted Amtrak's motion for summary judgment and denied the cross motions of the PUC and Township. The District Court found any assessment of costs to Amtrak for the design, construction or maintenance of the Cassatt Avenue bridges to be a tax, thereby violating the provisions of 45 U.S.C. §546b. The Order permanently enjoined the Commission's enforcement of its May 30, 1986 Order assessing costs against Amtrak.

The PUC and the Township appealed to the United States Court of Appeals for the Third Circuit. The Pennsylvania Department of Transportation and the Consolidated Rail Corporation submitted Amicus Curiae briefs on behalf of the PUC and the Township.

The Third Circuit issued its Opinion and Order filed June 6, 1988, *as amended*, June 21, 1988, affirming the District Court.

REASONS FOR GRANTING WRIT

I

Certiorari Should Be Granted To Decide a Question of Federal Law and Resolve the Conflict in Federal Policy Which Results From the Lower Court's Opinion

The safety of highway and railway crossings is a matter of vital national importance. Pursuant to 23 U.S.C. §144, the United States Congress instituted a highway-bridge replacement and rehabilitation program. That statute states:

> (a) Congress hereby finds and declares it to be in the vital interest of the Nation that a highway bridge replacement and rehabilitation program be established to enable the several States to replace or rehabilitate highway bridges over waterways, other topographical barriers, other highways, or railroads when the States and the Secretary find that a bridge is significantly important and is unsafe because of structural deficiencies, physical deterioration, or functional obsolescence.

Congress required the Department of Transportation to set national bridge inspection standards in an effort to eliminate safety problems with the nation's bridges. *See* 23 U.S.C. §151.

The Department of Transportation, also the federal agency responsible for railroad safety, at the request of Congress, focused attention upon the elimination of unsafe

at-grade railroad and highway crossings. Section 433 of Title 45 U.S.C. states:

> (a) The Secretary shall submit to the President for transmittal to the Congress, within one year after October 16, 1970, a comprehensive study of the problem of eliminating and protecting railroad grade crossings, including a study of measures to protect pedestrians in densely populated areas along railroad rights-of-way, together with his recommendations for appropriate action including, if relevant, a recommendation for equitable allocation of the economic costs of any program proposed as a result of such study.

45 U.S.C. §433.

The separation of a grade crossing involves either the building of a highway bridge over railroad tracks or a railroad bridge over a highway. This may involve the dynamiting of a crevice into the earth in order to place railroad tracks below street level. When this is done, the intersecting highway must be transformed into a bridge over the crevice. Thousands of bridges constructed throughout the nation in order to separate crossings must now be inspected in accordance with Federal standards which were developed to prevent widespread bridge failure from threatening life and property. One need only imagine the disaster that would result from the failure of a highway bridge over Amtrak tracks as a passenger train approached at 70 miles per hour.

The decision to build a highway bridge, rather than a railroad bridge, is based on economics, topography, and engineering physics. The motivation is the need for two transportation modes to occupy the same space. Of the two modes, the highway possesses the paramount legal in-

terest. *Erie Railroad Company v. Board of Public Utility Commission*, 254 U.S. 394 (1921). This interest is not surrendered when it takes the form of a secondary physical position.

The historical placement of primary financial responsibility on the railroads for the separation of crossings has correspondingly yielded to reflect the increasing benefits derived from highway traffic. *See* Report to Congress, *Railroad-Highway Safety Part I: Comprehensive Statement of the Problem* (1971).

States, however, maintain authority over safety at crossings and complete control over allocation of costs provided that due process is afforded. *American Trucking Associations, Inc. v. United States*, 242 F. Supp. 597 (D.D.C. 1965). Indeed, 45 U.S.C. §434 states that:

> [a] State may adopt or continue in force any law, rule, regulatory order or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such state requirement.

The concerned parties in a bridge crossing matter are usually a railroad, a municipality, a county, a state highway agency and utilities with facilities within the crossing. Ownership interests in the bridge are typically unclear. If there were no PUC, or similar agency to assign responsibility, bridges such as Cassatt Avenue would go unrepaired. This authority must not be summarily abrogated and the safety of the public, protected by the PUC, dismissed as being of "no moment." *See* Opinion of Third Circuit, Appendix A at page 5a. Congress did not find the safety concerns to be of "no moment" when it charged the Secretary of Transportation with implementing the two

policies discussed earlier: the elimination of grade crossings and inspection of bridges for public safety.

This case requires the review by this Honorable Court to determine if section 546b was intended to assist Amtrak's financial security, so far as to override the safety policies enunciated by Congress for bridges and crossings found in 45 U.S.C. §433 and 23 U.S.C. §151. Bridge crossings are of paramount concern. "[C]ooperation is necessary among railroads, the Corporation [Amtrak], state, regional, and local government. . . ." 45 U.S.C. §501. The Third Circuit's opinion threatens such cooperation, thereby threatening the safety of the traveling public.

II

Petitioner's Request for Review Should Be Granted Because the Lower Court Erred in Its Analysis of Statutory Construction

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Instrumentalities of the United States are constitutionally immune from taxes but that immunity does not extend to their contractors. *United States v. Boyd*, 378 U.S. 39 (1964). Such immunity must be specifically waived. *United States v. City of Pittsburgh*, 589 F. Supp. 179 (W.D. Pa. 1984), *rev'd on other grounds* 757 F.2d 43 (3d Cir. 1985). Any statute waiving that immunity is narrowly construed in order to preserve the "rule" rather than enlarge exceptions. Congress must express a clear, affirmative desire to waive that exemption. *United States v. City of Adair*, 539 F.2d 1185 (8th Cir. 1976) *cert. denied*, 429 U.S. 1121 (1977). Amtrak, however, is not an instrumentality of the United States. *Sentner v. Amtrak*, 540 F. Supp. 557

(D. N.J. 1982); *National Railroad Passenger Corporation v. Miller*, 358 F. Supp. 1321 (D. Kan. 1973) *aff'd*, 414 U.S. 948, 94 S.Ct. 285, 38 L.Ed. 2d 205 (1973). Therefore, it is not immune from taxes. Amtrak is a for profit corporation and is not an agent or establishment of the United States. 45 U.S.C. §541 states:

> There is authorized to be created a National Railroad Passenger Corporation. The Corporation shall be operated and managed as a for profit corporation, the purpose of which shall be to provide intercity and commuter rail passenger service, employing innovative operating and marketing concepts so as to fully develop the potential of modern rail service in meeting the National's intercity and commuter passenger transportation requirements. The corporation will not be an agency or establishment of the United States Government. It shall be subject to the provisions of this chapter and, to the extent consistent with this chapter, to the District of Columbia Business Corporation Act [D.C. Code 29-301 et seq.]. The right to repeal, alter, or amend this chapter at any time is expressly reserved.

45 U.S.C. §541 (Pub.L. 91-518, Title III, § 301, Oct. 30, 1970, 84 Stat. 1330; Pub.L. 95-421, § 11, Oct. 5, 1978, 92 Stat. 928; Pub.L. 97-35, Title XI, § 1188(a), Aug. 13, 1981, 95 Stat. 699.)

Amtrak's only claim to relief from taxation is found in the language of Section 546b. This statute grants an exception to the rule and, therefore, should be construed narrowly in order to preserve the general rule. The lower Court enunciated this general principle in its opinion. The Court wrote:

> From these cases some general rules emerge. When a tax exemption is granted to certain private entities, the statutory language is construed closely because it affords a special privilege not available to others. Likewise, when a statute waives the federal government's freedom from local taxation, that language is also narrowly construed because it defeats the immunity shielding the federal government.

848 F.2d 436 at 439, *See* Appendix A, page 9a. The Court then concluded that the general principle does not apply to Amtrak.

> It is not necessary to decide here whether Amtrak is an 'instrumentality' of the federal government; the unique structure and mission of the Corporation are sufficient to remove it from the realm of purely private entities. Consequently, we need not assume that the customary presumption of obligation to pay state and local taxes applies to the Corporation. To the contrary, the signals point the other way. The House Committee on Energy and Commerce said that Amtrak was to be exempt from payment of 'all state and local taxes, including but not limited to property taxes, income and franchise taxes, sales taxes, gross revenue taxes, fuel taxes, licenses and other fees, to the same extent as the United States is exempt from the payment of such taxes or other fees.' H.R. Rep. No. 81, 97th Cong., 1st Sess. 21 (1981), quoted in 665 F. Supp. at 405 n.7.

The Court also determined that it could change the general rule for Amtrak without classifying it as an instrumentality of the United States. Had it done so, the reasoning would have been more sound but would have been in direct conflict with cases which held otherwise and with the National Railroad Passenger Act. Without doing so, the

Court's reasoning is seriously flawed and affords to Amtrak a privilege not available to other railroads. Amtrak, therefore, can escape the need for a specific waiver from immunity required of federal instrumentalities as well as the "cost allocations" other railroads must pay. The lower Court's decision extends to Amtrak immunities beyond those afforded even the Federal government and its instrumentalities while at the same time Amtrak escapes the police powers of state authorities.

III

A Writ of Certiorari Should Issue To Properly Interpret the Federal Statute in Accordance With Statutory Construction so That It Does Not Impinge Upon the Police Power of the States

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The lower Court's decision is based upon a misinterpretation of the definition of "tax." This Honorable Court defined tax in *United States v. Butler*, 297 U.S. 1 (1936):

> A tax, in the general understanding of the term, and as used in the Constitution, signifies an exaction for the support of the government.

279 U.S. at 61.

In *Staub v. Harris*, 626 F.2d 275 (3d Cir. 1980) the Third Circuit cited Black's Law Dictionary when it defined taxes as follows:

> 'taxes,' as the term is generally used are public burdens imposed generally upon the inhabitants of the whole state, or upon some civil division thereof,

> for governmental purposes, *without reference to peculiar benefits to particular individuals or property.* (Emphasis added.)

626 F.2d at 278.

Taxes are levied by legislative bodies, in the exercise of the taxing power. The contributions are proportionately payable in money, and imposed, levied and collected for the purpose of raising revenue to be used for governmental purposes. 84 C.J.S. Taxation §1b (1954). The application of the general rule derived from case law by the lower Court requires that the word "tax" be interpreted narrowly. A narrow interpretation would define "tax" in a traditional and common sense manner, such as in the above definitions.

In deciding whether a federal instrumentality is required to pay money by a state, municipality or other taxing authority, rather than being immune, the Court asks whether there would be a direct and palpable burden upon the federal agency so as to obstruct it in the performance of the functions delegated to it by Congress. *Pittman v. Home Owners Corporation*, 308 U.S. 21 (1939). The same question can be asked of Amtrak. As long as the payments required by Amtrak are just and reasonable and in accordance with due process and *relate to the benefits derived* by Amtrak, the payments do not obstruct the performance of Amtrak as a common carrier. In the record below, the PUC found that Amtrak benefitted directly from reconstruction of the deteriorating bridge over its tracks.

It is also helpful to look at the other parties and statutes controlling the PUC's allocation of costs in similar circumstances. The cost allocation against Amtrak is of the very same nature as cost allocations by the PUC against

the Department of Transportation, municipalities and other railroads, i.e., Conrail, SEPTA, etc. Had that cost allocation been a "tax" in the traditional and narrow sense, would it not have violated the Revised Interstate Commerce Act, 49 U.S.C.A. §10101 *et seq.*, specifically Section 11503 which prohibits discriminatory taxation of railroads? *See Atchison, T. & S.F. R.R. v. Bair*, 338 N.W. 2d 338 (Iowa 1983), *cert. denied*, 465 U.S. 1071 (1984). This obviously is not the case since Congress allowed such cost allocations, relative to benefits received, against other railroads up to ten percent of the cost of the project when it instituted the Federal Aid Highway Act. *See* 23 U.S.C. §130(b) and (c). If bearing their fair share of a bridge repair is not a tax for other railroads, then it cannot be a tax for Amtrak. Also, can one state agency without "taxing" authority impose a tax on another state agency or municipality? The answer is, obviously, no.

Even the payment phase bears no resemblance to traditional tax collection. The PUC assigns project costs by ordering payments from one party to another. The PUC does not receive, transfer, or disburse funds and does not have a mechanism for doing so. There are no costs for PUC administrative purposes included in the allocation orders. Rather, the costs involved represent those of the involved parties which were generated by safety improvements constructed at a public rail crossing.

If the cost of maintaining railroad-highway crossings is disguised as a tax, then the legitimate cost of operating a railroad would be misrepresented. When that railroad is federally subsidized, then that misrepresentation of actual deficits suffered by the railroad takes on national importance. It is most difficult, therefore, to view the cost allocation against Amtrak as any type of traditional tax.

A third way to determine whether the cost allocation is a "tax" in a narrow and traditional manner is to look at whether the authority commanding the payment is exercising its power of taxation. The Pennsylvania PUC is not a taxing authority. It is police power that allows a state to require a railroad to build an overhead bridge. *See Northern Pacific Railway Company v. Minnesota*, 208 U.S. 583 (1907). There is a distinction between police power and taxing power. *See Mobil Oil Corporation v. Tully*, 639 F.2d 912 (2d Cir.) *aff'd*, 452 U.S. 967 (1981). Further, the police power exercised over railroads devoted to public use is much more extensive and more broad than the police power over private property of citizens. *See Chicago B. & Q. R.R. v. Chicago*, 166 U.S. 266 (1896).

The Court below states that the "issue in this case does not hinge on the power of the state to enforce safety measures at grade crossings, and the plaintiff does not challenge the state's authority in that area," opinion of the lower Court, Appendix A, p. 5a; yet that is, effectively, the issue that is decided. Safety is not free. Safety measures such as separating grade crossings or installing gates and lights provide protection for both the railroad and the traveling public, but they are expensive. Costs are routinely divided among the parties that benefit from the safety measures in a manner that reflects the benefits received.

The opinon of the Court below refers to the bridge replacement as a "local improvement" as if Amtrak had been ordered to contribute to upgrading a children's playground, opinion of the lower Court, Appendix A, p. 11a. The project involved is the replacement of an old pedestrian and highway bridge which can no longer be used safely. Moreover, the replacement benefits Amtrak directly by improving the safety of its rail facilities.

A narrow interpretation of the statute would also allow "special assessments" against Amtrak provided that those assessments were *not* found to be in the nature of traditional taxation. Case law interpreting "special assessments" both as a tax and as a non-tax can be found. The distinctions drawn which determine if a special assessment amounts to a tax revolve around the specific facts resulting in that special assessment. *See Illinois Central R.R. v. Decatur*, 147 U.S. 190 (1892); *Red River Levee District No. 1 v. Reconstruction Finance Corp.*, 170 F.2d 430 (8th Cir. 1948); *United States v. Anderson Cottonwood Irrigation Dist.*, 19 F. Supp. 740 (N.D. Calif. 1937). If the special assessment does not qualify as a traditional tax, it must be included in the statute specifically if there was to be an exemption under the rules of statutory construction.

A writ of certiorari must issue in order that the Court may interpret a federal statute which under the lower Court's interpretation would cripple the ability of the states to fairly and equitably ensure the maintenance and repair of railroad-highway bridges.

IV

A Writ of Certiorari Must Issue to Determine if Language in the Statute is Unconstitutionally Vague

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The language of §546b must be construed narrowly. In so doing, the costs allocated are not a "tax" within the ordinary meaning of that word. The phrase "or other fee imposed by state or local governments" must also be interpreted narrowly. This language is unconstitutionally vague. There is no modifying clause which would explain what a fee is in the context of the statute. This distinguishes it

from other statutes which use "any other" in their language.

An example of this is *Atchison T. & S.F. R.R. v. Bair*, 338 N.W. 2d 338 (Iowa 1983) *cert. denied*, 465 U.S. 1071 (1984). There, the Court determined that the phrase "any other tax" was not vague or unambiguous. That language was followed by this modifying clause: "which results in discriminatory treatment of a common carrier by railroad," which clearly discloses what behavior is prohibited. The language of §546b does not have a clear modifying clause disclosing the purpose of the prohibition and therefore it remains vague. A statutory term assumes meaning from the context in which it is used and from the backdrop of the congressional purpose in enacting the statute. *United States v. Duncan*, 527 F.2d 1278 (3d Cir. 1975). Courts will not impute to Congress a radical departure from established law in absence of *express* Congressional command. *Minpeco S.A. v. Conti-Commodity Services*, 558 F. Supp. 1348 (S.D.N.Y. 1983).

CONCLUSION

WHEREFORE, Petitioner prays that a Writ of Certiorari be granted.

Respectfully submitted,

LINDA C. SMITH*
Assistant Counsel

SUSAN D. COLWELL
Assistant Counsel

JOHN B. WILSON
Deputy Chief Counsel

DANIEL P. DELANEY
Chief Counsel

Counsel for Petitioner,
Pennsylvania Public Utility Commission

**Counsel of Record*

Dated September 2, 1988

CERTIFICATE OF SERVICE

I hereby certify that I am, this 2nd day of September, 1988 serving by first class mail, postage prepaid, a copy of the foregoing Petition for Writ of Certiorari to the Third Circuit Court of Appeals of the Pennsylvania Public Utility Commission upon the persons listed below:

Peter S. Craig, Esquire
National Railroad Passenger Corporation
400 North Capitol Street N.W.
Washington, D.C. 20001

William H. Lamb, Esquire
Lamb Windle & McErlane, P.C.
24 East Market Street
P.O. Box 565
West Chester, PA 19381-0565

Stephen F. J. Martin, Esquire
Commonwealth of Pennsylvania
Department of Transportation
Office of Chief Counsel
Harrisburg, PA 17120

Richard A. Levan, Esquire
Pepper Hamilton Sheetz
29th Floor
The Fidelity Building
123 South Broad Street
Philadelphia, PA 19109-1083

Linda C. Smith
Assistant Counsel

NATIONAL RAILROAD PASSENGER CORPORATION

v.

COMMONWEALTH OF PENNSYLVANIA PUBLIC UTILITY CORPORATION and Township of Tredyffrin.

Appeal of TOWNSHIP OF TREDYFFRIN.

Appeal of COMMONWEALTH OF PENNSYLVANIA PUBLIC UTILITY COMMISSION.

Nos. 87-1445, 87-1446.

United States Court of Appeals,
Third Circuit.

Argued March 7, 1988.

Decided June 6, 1988.

As Amended June 21, 1988.

Amtrak brought action for declaratory and injunctive relief against order of Pennsylvania Public Utility Commission assessing certain right-of-way costs against Amtrak. The United States District Court for the Eastern District of Pennsylvania, Clarence C. Newcomer, J., 665 F.Supp. 402, entered judgment for Amtrak. On appeal, the Court of Appeals, Weis, Circuit Judge, held that statute granting Amtrak exemption from "any taxes or other fees" imposed by any State covered special assessment levied by state agency for construction of railroad grade crossing improvements.

Affirmed.

1. Taxation 204(2)

When tax exemption is granted to certain private entities, statutory language is construed closely because it affords special privilege not available to others.

2. Taxation 5

When statute waives federal government's freedom from local taxation, that language is narrowly construed because it defeats immunity shielding federal government.

3. Taxation 204(2)

In interpreting tax exemption statute; intention of legislative body is pivotal.

4. Municipal Corporations 405

Fact that expenditures for local improvements are financed solely by municipalities without assistance from state legislature may be element in determining whether special assessments qualify as tax for purposes of statutory exemption.

5. Railroads 94(1)

Statute granting Amtrak exemption from "any taxes or other fees" imposed by any State covers special assessment levied by state agency for construction of railroad grade crossing improvements. Supplemental Appropriations Act, 1982 § 108, 45 U.S. C.A. §546b.

See publication Words and Phrases for other judicial constructions and definitions.

William H. Lamb, Lamb, Windle & McErlane, P.C., West Chester, Pa., for Tredyffrin Tp.

John J. Gallagher (argued), Asst. Counsel; John B. Wilson, Deputy Chief Counsel, Daniel P. Delaney, Chief Counsel, Harrisburg, Pa., for Pennsylvania Public Utility Com'n.

Peter S. Craig (argued), Dennis M. Moore, Christopher M. Klein, Washington, D.C., Harold K. Cohen,

National R.R. Passenger Corp., Philadelphia, Pa., for appellee National R.R. Passenger Corp.

Laurence Z. Shiekman, Richard A. Levan, Robert S. Natalini, Pepper, Hamilton & Scheetz, Philadelphia, Pa., Donald A. Brinkworth, John F. Fansmith, Jr., Daniel F. Donovan, of counsel, for amicus curiae Consolidated Rail Corp.

Stephen F.J. Martin, Herbert G. Zahn, Asst. Counsels, Robert H. Raymond, Jr., Asst. Chief Counsel, John L. Heaton, Chief Counsel, Office of Chief Counsel, Dept. of Transp., Com. of Pennsylvania, Harrisburg, Pa., for amicus curiae Com. of Pennsylvania, Dept. of Transp.

Before WEIS, GREENBURG and ALDISERT, Circuit Judges.

OPINION OF THE COURT

WEIS, Circuit Judge*

Congress granted Amtrak an exemption from "any taxes or other fees imposed by any State" 45 U.S.C. §546b. On this appeal, we consider whether that statute covers a special assessment levied by a state agency for the construction of railroad grade crossing improvements. The district court held the exemption applied and entered summary judgment sustaining Amtrak's challenge to the assessment. We will affirm.

The pertinent facts are not in dispute. Following state administrative proceedings, the Pennsylvania Public Utility Commission directed Amtrak to pay approximately twenty percent of the cost of replacing a bridge situated in

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* At the time of oral argument on this case, the Honorable Joseph F. Weis, Jr., was an active circuit judge. Since that time, Judge Weis has assumed senior status.

Tredyffrin Township, Pennsylvania. The existing bridge, constructed in 1899 by the Pennsylvania Railroad Company, carries Cassatt Avenue over tracks owned amd presently used by the National Railroad Passenger Corporation (Amtrak).[1] The remaining eighty percent of the reconstruction expense was allocated to Tredyffrin Township which, in turn, would be reimbursed by the state. The Commission also ordered Amtrak to assume certain maintenance costs of the proposed new bridge and adjoining pedestrian walkway.

Amtrak challenged the Commission's order as inconsistent with the tax exemption granted it by Congress in 45 U.S.C. §546b. The Commission rejected this argument *sub silentio*. Amtrak then sought declaratory and injunctive relief in the district court. Both parties filed cross-motions for summary judgment.

Reviewing the legislative history of Amtrak's tax exemption, the district court determined that the statute was designed to "guarantee Amtrak's fiscal integrity, and indeed its survival." *National R.R. Passenger Corp. v. Pennsylvania Pub. Util. Comm'n*, 665 F.Supp. 402, 411 (E.D.Pa. 1987). The Act creating Amtrak demonstrated "a federal commitment to maintain and improve rail passenger service, federal controls over Amtrak management and operations and federal financial support for Amtrak." *Id.*

Against this background, the court decided that it "would be inappropriate to undermine those goals through

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[1] The district court noted that freight trains operated by the Consolidated Rail Corporation (Conrail) and commuter trains operated by the Southeastern Pennsylvania Transportation Authority (SEPTA) also use these tracks. However, both operators pay Amtrak for the right to use its rails. *National R.R. Passenger Corp. v. Pennsylvania Pub. Util. Comm'n*, 665 F.Supp. 402, 404 n. 4 (E.D.Pa. 1987).

the too stingy construction of the exemption offered by defendants." *Id.* Holding that the statutory exemption found in section 546b included an order by the Commission to pay an assessment, the court entered judgment for Amtrak. The Township and Commission defendants both appealed, and their cases were consolidated.

Defendants mount two arguments. First, they contend that the Commission's assessment was a valid exercise of the state's police power to enforce safety at grade crossings. Alternatively, they argue that the assessment is not a tax within the meaning of section 546b. The district court rejected the police power—safety argument as being "of no moment." We agree. The issue in this case does not hinge on the power of the state to enforce safety measures at grade crossings, and plaintiff does not challenge the state's authority in that area. Rather, the dispositive question is whether the federal statute at issue here exempts Amtrak from underwriting the safety measures the Commission ordered. The answer rests on statutory construction.

The conditions which prompted Congress' creation of Amtrak were described by the Supreme Court in *National R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry.*, 470 U.S. 451, 453-57, 105 S.Ct. 141, 1445-47, 84 L.Ed.2d 432 (1985). In 1929 approximately 20,000 intercity trains rode the rails in this country. That number diminished to about 11,000 in 1946 and, by 1971 to fewer than 500. Those railroads which continued to carry passengers incurred heavy and continuing losses, prompting requests for regulatory approval to discontinue service. The passenger coach, once a vibrant force in American cultural and economic life, seemed destined to take its place in the

transportation museum, alongside the stagecoach and side-wheeler.

In an effort to revive the failing intercity passenger lines, Congress enacted the Rail Passenger Service Act in 1971, 45 U.S.C. §§501-658, establishing the National Railroad Passenger Corporation, a private corporation better known by its official nickname "Amtrak." The Corporation is not "an agency or establishment" of the federal government, but is authorized by the government to provide intercity rail passenger service. *Atchison, Topeka & Santa Fe Ry.*, 470 U.S. at 454-55, 105 S.Ct. at 1445-46.

Despite massive federal subsidies, Amtrak's financial picture was bleak. In 1979, Congress directed the Secretary of Transportation to study Amtrak's liability for payment of taxes to state and local governments. In his 1980 report, the Secretary estimated that these taxes would cost Amtrak more than $14 million in the next year. S.Rep.No. 253, 97th Cong., 1st Sess. 103 (1981). The Secretary concluded that "State and local taxes on a primarily Federal investment are inappropriate." *Id.*

The Senate appropriations Committee agreed, reasoning that "such taxation serves to erode the revenue-to-cost ratios which impact on whether States and localities continue to receive the benefits of Amtrak service." *Id.* The Committee disapproved the process through which federal subsidies were used to provide tax windfalls to states and localities. Subsequently, Congress deferred for one year Amtrak's payment of any state or local taxes. Pub. L. No. 97-102, 95 Stat. 1442, 1451 (1981).

Congress reviewed the matter again the following year and converted Amtrak's temporary exemption into a continuing one. A Senate Committee Report commented that "there are many parts of the country which would gladly

pay an amount equal to local or State taxes owed by Amtrak in order to have the benefit of Amtrak service." S.Rep.No. 516, 97th Cong., 2d Sess. 170 (1982), *quoted in National R.R. Passenger Corp. v. New Castle County*, 633 F.Supp. 354, 357. (D.Del.1088). The Report concluded: "At a time when local jurisdictions are demanding that nationwide rail passenger service be maintained, it seems reasonable to provide for a 'user contribution' whereby those areas receiving the service in turn contribute to Amtrak's continued existence through tax relief." *Id.*, *quoted in New Castle County*, 633 F.Supp. at 358.

The applicable statutory provisions, codified at 45 U.S.C. §546b, reads: "Notwithstanding any other provision of law, the National Railroad Passenger Corporation (the 'Corporation') shall be exempt from any taxes or other fees imposed by any State, political subdivision of a State, or local taxing authority which are levied on the Corporation, or any railroad subsidiary thereof, from and after October 1, 1981. . . ."

The precise issue here is whether the phrase "any taxes or other fees" contained in this statute covers charges of the nature levied against Amtrak for building and maintaining the Cassatt Avenue bridge. Although not so labeled, the payments demanded of Amtrak in this case are similar to "special assessments" exacted by local municipalities to finance such projects as the construction and upkeep of streets, sidewalks, and sewers. Whether such "special assessments" will be construed as "taxes" depends on the context in which the terms are raised.

In *Robinson Protective Alarm Co. v. City of Philadelphia*, 581 F.2d 371 (3d Cir.1978), we decided that the phrase "any tax" in the Tax Injunction Act, 28 U.S.C. §1341, must be interpreted to include a Philadelphia ordi-

nance imposing a special assessment on users of the City's underground alarm system wires. In reaching our conclusion, we explained that the meaning of the word "tax" was a matter of federal law deduced from congressional policy underlying the statute, rather than from state tax labels developed in an entirely unrelated legal context. *Id.* at 374. *Accord Wright v. McClain*, 835 F.2d 143, 144 (6th Cir.1987). *See also Carpenter v. Shaw*, 280 U.S. 363, 367-68, 50 S.Ct. 121, 122-23, 74 L.Ed. 478 (1930); *Tramel v. Schrader*, 505 F.2d 1310, 1314-16 (5th Cir.1975).

However, the Court of Appeals for the Eighth Circuit, in constricting the Federal Reserve Bank's waiver of immunity from local taxes "except taxes upon real estate," 12 U.S.C. §531, held that a special assessment would not qualify as a real estate "tax". *Federal Reserve Bank v. Metrocentre Improvement Dist. No. 1*, 657 F.2d 183 (8th Cir.1981), *aff'd*, 455 U.S. 995, 102 S.Ct. 1625, 71 L.Ed.2d 857 (1982). The court stated that "where there is federal immunity from taxation, Congress must express a clear, express, and affirmative desire to waive that exemption." *Id.* at 186. Although not entitled to immunity from "taxes on real estate," the Federal Reserve bank as an instrumentality of the United States government would enjoy an exemption from local "assessments". *Id.* at 186-87. *See John K. & Catherine S. Mullen Benevolent Corp. v. United States*, 290 U.S. 89, 54 S.Ct. 38, 78 L.Ed. 192 (1933); *United States v. City of Adair*, 539 F.2d 1185 (8th Cir.1976), *cert. denied*, 429 U.S. 1121, 97 S.Ct. 1157, 51 L.Ed.2d 571 (1977).

Still another variation on this special assessment-tax distinction appears in *Illinois Central R.R. v. Decatur*, 147 U.S. 190, 13 S.Ct. 293, 37 L.Ed. 132 (1898). In that case, a state statute granted an exemption to a private railroad

"from all taxation under the laws of this State until sold." The Court held that this exemption would not extend to a county "assessment" against the railroad to defray the costs of grading and paving an adjacent street. The Court turned first "to the language employed in granting this exemption to see what the legislature intended." *Id.* at 203, 13 S.Ct. at 296. The state of Illinois seldom, if ever, appropriated money for local improvements, the Court found, and thus the exemption "must be held to contemplate a release, only as to such charges as would ordinarily find their way into the state treasury for legislative appropriation." *Id.* at 204, 13 S.Ct. at 296. That reasoning followed the rule widely accepted among the states that an exemption from taxation usually does not apply to special assessments that theoretically increase the value of the affected property.

[1-4] From these cases some general rules emerge. When a tax exemption is granted to certain private entities, the statutory language is construed closely because it affords a special privilege not available to others. Likewise, when a statute waives the federal government's freedom from local taxation, that language is also narrowly construed because it defeats the immunity shielding the federal government. In interpreting an exemption statute, the intention of the legislative body is pivotal. Moreover, as *Decatur* illustrates, the fact that expenditures for local improvements are financed solely by municipalities without assistance from the state legislature may be an element in determining whether special assessments qualify as a tax. These factors are helpful in constructing section 546b.

Initially, we examine the status of Amtrak. Although the statute provides expressly that Amtrak is neither "an agency or establishment of the United States Govern-

ment," 45 U.S.C. §541, the Corporation also is obviously not an ordinary private firm. Its Board of Directors consists of nine individuals, including the Secretary of Transportation ex officio, three members appointed by the President with Senate confirmation, and two members selected by the President from a list compiled by commuter authorities. *Id.* §543. Compensation for the officers is set by a schedule formulated by Congress. *Id.* §544.

The United States owns the railroad's preferred stock which is specifically not subject to the annual fee of the District of Columbia or to "any other form of taxation." *Id.* Congress appropriates sums for capital improvement and subsidies to replace revenue deficiencies, periodically adjusts Amtrak's regulatory scheme, and designates the national rail route system. *Id.* §§541-658.

It is not necessary to decide here whether Amtrak is an "instrumentality" of the federal government; the unique structure and mission of the Corporation are sufficient to remove it from the realm of purely private entities. Consequently, we need not assume that the customary presumption of obligation to pay state and local taxes applies to the Corporation. To the contrary, the signals point the other way. The House Committee on Energy and Commerce said that Amtrak was to be exempt from payment of "all state and local taxes, *including but not limited to* property taxes, income and franchise taxes, sales taxes, gross revenue taxes, fuel taxes, licenses and other fees, *to the same extent as the United States is exempt* from the payment of such taxes or other fees." H.R.Rep. No. 81, 97th Cong., 1st Sess. 21 (1981), *quoted in* 665 F.Supp. at 405 n. 7 (emphasis supplied).

As a consequence of Amtrak's federal ties, we must apply the rule compelling a liberal construction of a gov-

ernmental exemption and we will interpret the statutory language in a manner consistent with federal immunity from local taxes. The apportionment between state and local funding which influenced the *Decatur* decision is not implicated here. Rather, the principles of federal supremacy guide us.

[5] The statute's text, its legislative history, and analogous caselaw persuade us to give the exemption in section 546b a broad interpretation that fulfills the intent of Congress. That intention is clear—to impose a passenger rail "user fee" on state and local governments. It would be manifestly inconsistent with that design to make Amtrak pay for related local improvements in the many instances where the states could, and would, impose them. Therefore, we hold that Amtrak's immunity from local "taxes and other fees" in section 546b extends to assessments for local improvements of the kind at issue here.

Accordingly, we will affirm the judgment of the district court.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NATIONAL RAILROAD PASSENGER CORPORATION	:	CIVIL ACTION
v.	:	
COMMONWEALTH OF PENNSYLVANIA PUBLIC UTILITY COMMISSION, et al.	:	NO. 86-5357

MEMORANDUM

Newcomer, J. June 30, 1987.

The National Railroad Passenger Corporation ("Amtrak") brought this action for declaratory and injunctive relief against an Order of Pennsylvania Public Utility Commission ("Commission" or "PUC"). The Order, issued May 30, 1986, assessed against Amtrak certain costs involved in the replacement of the Cassatt Avenue bridge, which transverses an Amtrak right-of-way. Amtrak has moved for summary judgment, asserting that the assessment of costs by the Commission violates a federal statute which exempts Amtrak from the payment of taxes and certain other fees. *See* 45 U.S.C. §546b. The defendants, the Commission and Tredyffrin Township ("Township"), have cross-moved for summary judgment on two grounds: (1) the principle of res judicata bars Amtrak from seeking relief in this action from the Order of the Commission; and (2) that the levy against Amtrak is not a "tax or other fee" under 45 U.S.C. §546b. For the reasons set forth in this Memorandum, Amtrak's motion will be granted, and defendants' motions will be denied.

I. *Facts*[1]

The Commonwealth of Pennsylvania, in the exercise of its police power, has entrusted the Public Utility Commission with "broad powers in respect of the crossing of facilities of utilities and particularly of the crossing of highways and railroads." *Tarentum Borough v. Pennsylvania PUC*, 171 Pa. Super. 156, 160-61 (1952); *see Pennsylvania RR. Co. v. Pennsylvania PUC*, 136 Pa. Super. 1 (1936). The Public Utility Code, 66 Pa. C.S.A., contains the statutory authority for the Commission and the general structure of regulation of utilities and common carriers. Section 2702(c) of the Code[2] vests the PUC with exclusive authority to determine and order the manner in which railroad and highway crossings are constructed, altered, relocated or abolished, and which parties should perform the required work, bear the expenses and maintain the crossings. The PUC may appropriate real property to accomplish its orders, 66 Pa.C.S.A. §2702(d), and determine proper compensation therefor. 66 Pa.C.S.A. §2704(a). Such compensation, as well as the cost of construction, alteration, relocation or abolition of any crossing, are to be borne by the utility or utilities involved, the municipality or the Commonwealth of Pennsylvania, "in such proper proportion as the commission may, after due notice and hearing, determine." *Id*. In apportioning costs of railroad crossings, the PUC is not bound by any rigid rule, but

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[1] All of the facts enumerated in this section are undisputed. As such, if these facts are sufficient to demonstrate the entitlement of one party or another to judgment as a matter of law, then judgment will be entered. *See* Fed.R.Civ.P. 56(c); *see also Equimark Commerce Finance Co. v. C.I.T. Financial Services Corp.*, 812 F.2d 141, 144 (3d Cir. 1987); *Bank of America Nat. Trust and Sav. Ass'n. v. Hotel Rittenhouse Associates*, 595 F.Supp. 800 (E.D. Pa. 1984).

[2] 66 Pa.C.S.A. §2702(e) requires that in any such proceeding, notice must be given to all interested parties and a hearing must be held.

must take all relevant factors into consideration.[3] *Commonwealth, Department of Transportation v. Pennsylvania PUC*, 469 A.2d 1149 (Pa. Cmwlth. 1983); *Department of Transportation v. Pennsylvania PUC*, 346 A.2d 371, 375 (Pa. Cmwlth. 1975). The only substantive criterion by which the apportionment of costs is made and reviewed is that the order must be just and reasonable. *Consolidated Rail Corp. v. Pennsylvania P.U.C.*, 423 A.2d 1108 (Pa. Cmwlth. 1980). *Pennsylvania P.U.C. v. Department of Transportation*, 2 Pa. Cmwlth. 144 (1971). A party dissatisfied with the allocation of costs made by the PUC can seek judicial review by appealing the decision to Commonwealth Court. 66 Pa.C.S.A. §2704(b); 42 Pa.C.S.A. §763(a)(1).

On April 18, 1981, the PUC began an investigation of a bridge carrying Cassatt Avenue over a railroad right-of-way in Tredyffrin Township. A hearing was held before Administrative Law Judge Martin R. Fountain on January 14, 1986. On April 1, 1986, ALJ Fountain issued a Recommended Decision, including findings of fact and a proposed order. The Recommended Decision approved replacement of the Cassatt Avenue bridge with two new

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[3] Some of the factors that have been held to be proper considerations by the Commission in allocating costs are (1) the relative benefits accruing to the parties (*Commonwealth of Pennsylvania, Department of Transportation v. Pennsylvania PUC*, 469 A.2d 1149 (Pa.Cmwlth. 1983)); (2) the existence of federal funds *Department of Highways v. Pennsylvania PUC*, 185 Pa. Superior Ct. 418 (1958); (3) deferred maintenance and origin and destination of bridge users (*Department of Transportation v. Pennsylvania PUC*, 346 A.2d 371 (Pa.Cmwlth. 1975)); (4) prior ownership and maintenance responsibilities (*Erie Lackawanna Railway Co. v. Pennsylvania PUC*, 2 Pa. Commonwealth Ct. 396 (1971)); and (5) successor in interest and ownership of tracks (*Consolidated Rail Corporation v. Pennsylvania PUC*, 423 A.2d 1108 (Pa.Cmwlth. 1980)).

structures, one for vehicular traffic and the other for use as a pedestrian walkway.

ALJ Fountain found that Amtrak owns and operates the rail line under the bridge.[4] Recommended Decision at 5. The Cassatt Avenue Bridge was built in 1899-1900 by the Philadelphia Division of the Pennsylvania Railroad Co. It was maintained by Pennsylvania Railroad in the past. Amtrak, the present owner of the tracks, has not maintained the bridge on its own. Recommended Decision at 6.

ALJ Fountain estimated that the cost of the recommended plan was $626,390, including $556,000 for construction and $70,390 for design costs. Recommended Decision at 7, Finding of Fact 4. Of that total, 80 percent would be paid by the Township, which amount would be recovered from the Commonwealth's fund established by the Billion Dollar Bridge Bill. Recommended Decision at 2, Finding of Fact 5. ALJ Fountain recommended that the remaining 20% of the cost be borne by Amtrak. Recommended Decision at 7. No portion of the costs was assigned to either SEPTA or Conrail. Under the recommended Order, Amtrak would be required to maintain the substructure of the proposed vehicular bridge, and the substructure, superstructure and stairway of the pedestrian walkway. Recommended Decision at 8. In addition, Amtrak was required to bear the "cost" of any damages resulting from diminution of its right of way by the Construction project. *Id.*

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[4] 104 passenger trains and 28 Conrail freight trains operate at that location at speeds up to 70 miles per hour. Of the 104 passenger trains, 71 are SEPTA commuter trains and 33 are Amtrak trains. Conrail and SEPTA pay Amtrak for the right to operate their trains over the Amtrak tracks. Recommended Decision at 5-6.

Following the issuance of the Recommended Decision, Amtrak filed an Exception with the Commission. In its brief, Amtrak argued that the Commission lacked the authority to order Amtrak to pay construction costs. Amtrak's argument was premised upon 45 U.S.C. §546b, the same statute upon which the instant suit is grounded.[5] On May 30, 1986, with certain changes not relevant here, the PUC adopted the Recommended Decision, and ordered that its terms be given effect. The PUC did not address Amtrak's legal argument, rejecting it *sub silentio*. Amtrak did not appeal to the Commonwealth Court, instead filing the instant action to challenge the legality of the Commission's order.

II. *Amtrak's Tax Exemption*

Amtrak was established in 1971 as a "for-profit" corporation. 45 U.S.C. §541. Although Congress envisioned that Amtrak eventually would become independent of federal financial support, it soon became apparent that such would not be the case. By 1980, Congress began studying ways to reduce federal outlays to Amtrak. It passed legislation requiring Amtrak to recover at least one-half of its operating costs from revenues, 45 U.S.C. 546(c)(4)(A), to eliminate any deficit resulting from the on-board sale of food and beverages, 45 U.S.C. §546(n), and to restructure its routes, 45 U.S.C. §545(f). *See generally* H. Rpt. 97-81, 97th Cong., 1st Sess. (1981); S.Rpt. 253, 97th Cong., 1st Sess. (1981).

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[5] The argument contained in Amtrak's exceptions to the Recommended Decision of ALJ Fountain took a slightly different form from Amtrak's current argument. There, Amtrak argued that the PUC lacked jurisdiction to assess the costs against Amtrak because the federal statute preempted the field. As argued here, I believe more properly, the question is cast in terms of authority and not jurisdiction.

On September 10, 1982, Congress enacted Public Law 97-257, granting Amtrak an exemption from all state and local taxes after October 1, 1981. The statute provides:

> Notwithstanding any other provisions of law, the National Railroad Passenger Corporation (the "Corporation") shall be exempt from any taxes or other fees imposed by any State, political subdivision of a State, or a local taxation authority which are levied on the Corporation, or any railroad subsidiary thereof, from and after October 1, 1981 including such taxes and fees levied after September 30, 1982. . . . Notwithstanding the provision of section 1341 of Title 28, the United States district courts shall have original jurisdiction over any civil actions brought by the Corporation to enforce the exemption conferred hereunder and may grant equitable or declaratory relief as requested by the Corporation.

96 Stat. 852 (1982), codified at 45 U.S.C. §546b.[6] The rationale for the exemption was set forth in the Senate Appropriations Committee Report:

> It is generally recognized that State and local taxes on a primarily Federal investment are inappropriate. Moreover, such taxation serves to erode the revenue-to-cost ratios which impact on whether states and localities continue to receive the benefit of Amtrak service. The Committee believes it is unreasonable for Federal funds to be granted to Amtrak to provide a tax windfall to States and localities, and consequently the bill prohibits Amtrak from using any appropriated

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[6] *National Railroad Passenger Corp. v. New Castle County*, 633 F.Supp. 354 (D.Del. 1986), upheld the constitutionality of the Act. The question of constitutionality has not been raised in this action.

> funds or assets for the payment of any State and local taxes.

S.Rept. No. 353, 97th Cong., 1st Sess. 103 (1981). This language is part of the legislative history of the 1982 Transportation Appropriations Act (Pub.L. 97-102, 95 Stat. 1442), which included a provision deferring by one year the payment of all state and local taxes by Amtrak. Public Law 97-257, codified at 45 U.S.C. §546b, converted the one year deferral into a permanent exemption. Upon passing the permanent exemption, the Senate Appropriations Committee noted:

> This action was taken in recognition of the fact that there are many parts of the country which would gladly pay an amount equal to local or State taxes owed by Amtrak in order to have the benefit of Amtrak service. It remains the Committee's judgment that those who receive this service have some obligation to contribute toward its continuation. At a time when local jurisdictions are demanding that nationwide rail passenger service be maintained, it seems reasonable to provide for a "user contribution" whereby those areas receiving the service in turn contribute to Amtrak's continued existence through tax relief.

S. Rep. No. 516, 97th Cong., 2d Sess. 170 (1982).[7]

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[7] The House Committee on Energy and Commerce, in reference to a previous bill to provide an exemption from state and local taxes for Amtrak:

> [T]he Committee bill exempts Amtrak from the payment of "all state and local taxes, including but not limited to, property taxes, income and franchise taxes, gross revenue taxes, fuel taxes, license and other fees, to the same extent as the United States is exempt from the payment of such taxes and other fees.

E.Rep. No. 97-81, 97th Cong., 1st Sess. 21 (1981). The bill to which this report refers was not adopted in the particular form indicated.

In 1980, over $14 million of Amtrak's appropriation was used to pay state and local taxes. S.Rep. No. 253, 97th Cong., 1st Sess. 103 (1981). It is clear that Congress sought to ensure that its appropriation to Amtrak would be used to fund Amtrak's operations, and not to pass that appropriation through to the states as an indirect source of revenue sharing.

III. *Discussion*

In support of its motion for summary judgment, Amtrak argues that it has been exempted from such assessments and other taxes by federal statute. Defendants oppose Amtrak's motion and cross-move for summary judgment on the ground that the assessment of costs by the PUC is not a "tax or other fee" from which the federal statute exempts Amtrak. Defendants, however, raise res judicata preliminarily as a bar to relief in the instant suit. I turn first to that issue.

A. *Res Judicata*

Res Judicata, and the related doctrine of collateral estoppel, have as their basis the protection of final judgments, 1B Moore's *Federal Practice* ¶ 0.405[3] (2d ed. 1987), making valid final judgment binding on the parties and barring subsequent relitigation of the issues. *Id.* at ¶ 0.405[2]. The goal of both doctrines is "to secure the peace and repose of society by the settlement of matters capable of judicial determination." *Southern Pacific R. Co. v. United States,* 168 U.S. 1, 49 (1897). As the Pennsylvania Supreme Court wrote in *State Hospital for the Criminal Insane v. Consolidated Water Supply Co.,* 267 Pa. 29, 37 (1920):

> The purpose underlying res judicata is more than to serve the interests of one who may see fit to invoke

> the rule; it is a measure of public policy, based on the principle that the general welfare requires litigation not to be interminable. The courts, for the economy of time belonging to all litigants, will not consider a point which has already been adjudicated between the same litigants.

The prior decision upon which defendants base their res judicata defense is the PUC Order of May 30, 1986. Defendants argue that "Amtrak has had its day in court on the matters presented in the instant federal action. To allow this proceeding to continue would encourage repetitious litigation which res judicata and collateral estoppel are intended to prevent." PUC Brief in Support of its Motion for Summary Judgment at 6.

Under Pennsylvania law,[5]

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[5] Amtrak argues that, because the underlying issue is one of federal law, federal principles of res judicata apply. Plaintiff's Opposition to Defendants' Motions for Summary Judgment at 11 n.3. Amtrak relies primarily on *Maher v. City of New Orleans*, 516 F.2d 1051, 1056 (5th Cir. 1975) (Adams, J., sitting by designation), *cert. denied*, 426 U.S. 906 (1976). It is my considered opinion that *Maher* is incorrect. In considering whether to give preclusive effect to a state court judgment, a federal court is required to give the state judgment the same preclusive effect it would have in the state which issued the judgment. *Allen v. McCurry*, 449 U.S. 90, 96 (1980); Act of May 26, 1790, Ch. 11, 1 Stat. 122, codified at 28 U.S.C. §1738 ("The . . . judicial proceedings of any court of any state . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such state.") *See also* U.S.Const. art. IV, §1.

To accomplish the directive of this policy, it is necessary to apply the res judicata principles of the state which issued the judgment which is claimed to have preclusive effect.

> It has long been established that §1738 does not allow federal courts to employ their own rules of res judicata in determining the effect of state judgments. Rather, it goes beyond the common law and commands a federal court to accept the rules chosen by the

> When a court of competent jurisdiction has determined a litigated cause on its merits, the judgment entered and not reversed on appeal is, as between the parties to the suit and their privies, final and conclusive with regard to every fact which might properly be considered in reaching a judicial determination and with regard to all points of law adjudged[,] as those facts and points of law relate directly to the cause of action in litigation.

Stevenson v. Silverman, 417 Pa. 187, 191 (1965) (emphasis omitted), *quoting Goldstein v. Ahrens*, 379 Pa. 330, 334 (1954). *See also Wallace's Estate*, 316 Pa. 148, 153 (1934); *Brandschain v. Lieberman*, 466 A.2d 1035, 1037 (Pa. Super. 1983); *Jenkins v. Jenkins*, 371 A.2d 925, 929 (Pa. Super. 1977). "The essential inquiry is whether the ultimate and controlling issues have been decided in a prior proceeding in which the present parties had an opportunity to appear and assert their rights." *Callery v. Blythe Township Municipal Authority*, 432 Pa. 307, 312 (1968) (citation omitted).[9]

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state from which the judgment is taken. *McElmoyle v. Cohen*, 38 U.S. (13 Pet.) 312, 326 (1839); *Mills v. Duryee*, 11 U.S. (7 Cranch) 481, 485 (1813).

Kremer v. Chemical Construction Corp., 456 U.S. 461, 481-82 (1982).

[9] Stated another way, for the doctrine of res judicata to apply, there must be the so-called "four-identities." *Callery, supra*, 432 Pa. at 312. The four identities are: (1) identity of issues; (2) identity of causes of action; (3) identity of parties to the action; and (4) identity of the capacity of the party suing or sued. *Safeguard Mfg. Ins. Co. v. Williams*, 345 A.2d 664 (Pa. 1975); *Philadelphia Electric Co. v. Borough of Landsdale*, 424 A.2d 514, 519 (Pa. Super. 1981). Because this traditional means of characterizing the requirements of res judicata does little to aid the legal analysis and is fully covered by the more readily understood analysis quoted in the body of this Memorandum, I will no use it. Of course, if I were to employ this form of the test my conclusions would remain the same.

In certain instances, these principles of res judicata also apply to decisions of administrative agencies, "when the reasons for the uses of the rule in court proceedings are present in full force."[10] *City of McKeesport v. Pennsylvania PUC*, 442 A.2d 30, 31 (Pa.Cmwlth. 1982), *citing Philadelphia Electric Co. v. Pennsylvania PUC*, 433 A.2d 620 (Pa.Cmwlth. 1981). *See also* K. Davis, 4 *Administrative Law Treatise* §21.1 (2d ed. 1981); 1 *P.L.E.* Administrative Law and Procedure §93. Clearly when an administrative agency, adjudicating a dispute within its jurisdiction, in accordance with the requirements of due process—including giving the parties an opportunity to be heard—makes findings of fact which are not overturned on appeal, those findings are ordinarily entitled to preclusive effect. *United States v. Utah Construction and Mining Co.*, 384 U.S. 394, 422 (1966), *cited in Philadelphia Electric Co. v. Borough of Lansdale*, 424 A.2d 514, 521 (Pa. Super. 1981). But whether an administrative agency's decision on a question of law is to be given res judicata effect is a more complex question.

In *Philadelphia Electric Co. v. Borough of Lansdale*, *supra*, the Pennsylvania Superior Court faced the question whether to apply res judicata to a determination of the Federal Power Commission. In that case, plaintiff sued defendant in equity seeking reformation of a contract for the sale of electricity under Pennsylvania law. Plaintiff had unsuccessfully sought the same relief previously before the Federal Power Commission, which gave a full hearing and decided the issue on the merits according to Pennsylvania

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[10] Prior to *Philadelphia Electric*, *supra*, the Pennsylvania cases did not formally recognize the applicability of res judicata to decisions of administrative agencies, although they did recognize the need for finality in agency orders as well as those of courts. *See, e.g., West Penn Power Co. v. Pennsylvania PUC*, 174 Pa.Super. 119, 128-32 (1953).

Law. The Court of Common Pleas of Montgomery County reformed the contract and cross-appeals were taken. The Superior Court reversed, holding that the unapplied decision of the Federal Power Commission was res judicata.[11]

In so ruling, the Superior Court noted that the Federal Power Commission has recognized jurisdiction and authority to determine issues concerning the intent of parties to electric rate agreements, *id.* at 522, *citing City of Cleveland v. Federal Power Commission*, 525 F.2d 845 (D.C.Cir. 1976); *Sam Rayburn Dam Electric Coop. v. Federal Power Commission*, 515 F.2d 989 (D.C.Cir. 1975), and that "[i]n rendering its decisions, the Federal power Commission wrote detailed, reasoned opinions." *Borough of Lansdale, supra*, 424 A.2d at 522. The Superior Court continued:

> [I]t is clear that the Federal Power Commission, in determining rates, has the authority to inquire into the intent of the parties. . . . It has the expertise to decide rate cases, conducts its proceedings in a "judicial manner" affording each party the right to be heard, renders reasoned opinions in reaching its decisions, and has demonstrated the ability and willingness to apply recognized principles of state contract law to disputes involving the intent of the parties' [sic] to an agreement coming within its jurisdiction. In addition, the federal courts have recognized its competence in deciding matters previously discussed.

Id. The Court therefore held that res judicata should apply to the agency determination. *Id.* at 522-523.

Applying the same standards to the case before me, I conclude that the decision of the PUC is not entitled to res

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[11] In so doing, the Superior Court applied Pennsylvania res judicata principles. 424 A.2d at 519, 522 (employing the Pennsylvania "four identities" formulation).

judicata effect on the issue of Amtrak's statutory tax exemption. While it is beyond dispute that the PUC has the expertise and jurisdiction to perform its statutory duty to apportion costs of railroad crossings, *City of Philadelphia v. Pennsylvania PUC*, 496 A.2d 924, 926 (Pa.Cmwlth. 1985), its competence to determine other legal issues beyond the scope of its normal appropriation decision presents significant differences. Unlike the situation in *Borough of Lansdale, supra*, the legal determination required to decide if Amtrak may properly be assessed these construction and maintenance fees is not at all similar to the PUC's usual scope of decision-making. In apportioning costs, the only standard which the PUC must meet is that its decision be just and reasonable. *City of Philadelphia v. Pennsylvania PUC, supra*, 496 A.2d at 926. But to decide whether such a "just and reasonable" assessment is a tax from which Congress has exempted Amtrak is a determination of a different kind and order. Nothing in the PUC's normal fulfillment of its statutory mandate confers upon it the expertise to interpret such a federal statute.

It is true that the PUC, through its proceedings before the Administrative Law Judge, acted in a judicial manner and afforded each party the opportunity to be heard. The PUC did not, however, render a reasoned opinion delineating its basis for rejecting Amtrak's claim of exemption from the assessment. Rather, the PUC never addressed Amtrak's legal claim at all, simply affirming the ALJ's decision to impose the assessment against Amtrak,[12] and de-

[12] I do not mean to imply that the PUC could obtain res judicata or collateral estoppel effect for its decisions in this area simply by rendering reasoned opinions. That question is not before me. It seems doubtful, however, that the PUC could confer competence, expertise or jurisdiction upon itself simply by explaining the basis for its decisions in realms outside its normal scope of decision-making.

clining to address the legal question posed. The failure to address the substantive legal question confirms that the question posed lies beyond the normal scope of PUC process.[13] In addition, the PUC has not demonstrated the ability or the willingness to apply the relevant legal principles to Amtrak's legal challenge to the assessment against it. Under these circumstances, applying the standards discussed in *Borough of Lansdale* for the application of res judicata to administrative decision, I conclude that the PUC's determination that Amtrak is not exempt from the assessment imposed would not be binding on a state court, and is not binding on a federal court.

B. *Is Amtrak Exempt from the PUC Assessment?*

Amtrak argues that it is exempt from the PUC assessment for construction and maintenance of the right-of-way crossings by the clear import of the exemption in section 546b. Defendants agree that Amtrak has been exempted from state and local taxes. Defendants argue here, however, that the exemption does not apply to the PUC order in this case. Before addressing defendant's arguments I will set the context of the discussion.

Since the Supreme Court decided *McCulloch v. Maryland*, 17 U.S. (4Wheat.) 316 (1819) (Marshall, Ch.J.), it has been settled law that the federal government, its agencies and instrumentalities are immune from all forms

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[13] *But cf., Pennsylvania v. Brown*, 373 F.2d 771, 777 (3d Cir. 1967) (an issue clearly presented to a court is taken to be covered by the court's decision even if the issue is not addressed in the court's opinion). *Brown* properly presumes conclusively that state court decisions are binding on federal courts even if state interpretation issued *sub silentio*. That case did not, nor did those cases upon which it relied, address the circumstances in which any court, state or federal, would be bound by prior state agency rulings under the doctrine of res judicata or collateral estoppel.

of taxation. *United States v. County of Allegheny*, 322 U.S. 174, 177 (1944). This immunity extends not only to general taxation, but also to special assessments for local improvements. *Wisconsin Central Rr. Co. v. Price County*, 133 U.S. 496, 504 (1890); *Mullen Benevolent Corp. v. United States*, 290 U.S. 89 (1933); *United States v. Harford County*, 572 F.Supp. 239, 241 (D.Md. 1983); 49 Comp. Gen. 72 (1969). *See also United States General Accounting Office, Office of General Counsel, Principles of Federal Appropriations Law*, 3-187 to 3-194 (1982). On the other hand, the United States recognizes its obligation to pay state and local government charges for a quantum of goods or services provided, *Harford County, supra*, 572 F.Supp. at 241 (water and sewer services), as well as the costs associated with connection to local service systems. 39 Comp. Gen. 120 (1949) (connection to local sewer system).

While generally immune from local taxes and assessments the United States has the power to waive its immunity, in whole or in part. To effect, such a waiver, "Congress must express a clear, express, and affirmative desire to waive the exemption." *Federal Reserve Bank of St. Louis v. Metrocentre Improvement District, # 1*, 657 F.2d 183, 186 (8th Cir. 1981); *See County of Allegheny, supra*, 322 U.S. at 177; *United States v. City of Adair*, 539 F.2d 1185, 1189 (8th Cir. 1976), *cert. denied*, 429 U.S. 1121 (1977). Congressional waivers of federal tax immunity are to be strictly construed, *Oklahoma v. Barnsdall Corp.*, 296 U.S. 521, 526 (1936); *City of Adair, supra*, 539 F.2d at 1189, in keeping with a liberal view of the United States, immunity from all state and local taxes as a sovereign. Thus, it has been held that a statute which waives the immunity of a federal instrumentality from real estate taxes does not waive immunity from special assessments. *Metrocentre, supra; City of Adair, supra*.

As waivers of the tax immunity of the federal government or its instrumentalities are to be strictly construed, so too legislative exemptions of private entities from taxation by state and local entities are ordinarily strictly construed. *Illinois Central Rr. Co. v. City of Decatur*, 147 U.S. 190 (1892). In that case, Petitioner had been exempted by Illinois statute from the payment of taxes on land obtained under a federal grant. The City of Decatur, sought to impose on petitioner a special assessment to defray the costs of grading and paving a road. The trial court entered judgment in favor of Decatur, and the Supreme Court if Illnois affirmed. The United States Supreme Court also affirmed, explaining the rationale for its decision in the most general of terms. The Court distinguished general taxation from special assessments:

> Special assessments are a peculiar species of taxation, standing apart from the general burdens imposed for state and municipal purposes and governed by principles that do not apply generally. The general levy of taxes is understood to exact contributions in return for the general benefits of government, and it promises nothing to the persons taxed beyond what may be anticipated from an administration of the laws for individual protection and the general public good. Special assessments, on the other hand, are made upon the assumption that a portion of the community is to be specifically and peculiarly benefited, in the enhancement of the value of property peculiarly situated as regards a contemplated expenditure of public funds; and in addition to the general levy, they demand that special contributions, in consideration of the special benefit, shall be made by the persons receiving it. The justice of demanding the special contribution is supposed to be evident in the fact that the

> persons who are to make it, while they are made to bear the cost of a public work, are at the same time to suffer no pecuniary loss thereby, their property being increased in value by the expenditure to an amount at least equal to the sums they are required to pay. This is the idea that underlies all these levies. As in the case of all other taxation, it may sometimes happen that the expenditure will fail to realize the expectation on which the levy is made; and it may thus appear that a special assessment has been laid when justice would have required the levy of a general tax; but the liability of a principle to erroneous or defective application cannot demonstrate the unsoundness of the principle itself, and that which supports special assessments is believed to be firmly based in reason and justice.

147 U.S. at 198-99 (quoting *Cooley on Taxation* 416). The Court went on to state that a general legislative tax exemption could not be inferred to include an exemption from special assessments because special assessments are local in nature and do not produce revenue for the state treasury whereas general taxation produces revenue for the state treasury. Because the two types of taxation produce essentially different funds, in the *Decatur* Court's view an exemption from contributions to the state treasury does not in any way affect the susceptibility of a property owner to local contributions through special assessments. *Id.* at 204.

In light of these principles, I now turn to consider the scope of the exemption which Congress granted to Amtrak. Section 546b exempts Amtrak from the payment of "any taxes or other fees imposed by any state, political subdivision of a state, or local taxation authority." In con-

struing the statute, I begin with the plain meaning of its words, which is most likely to convey Congress' understanding of the law it enacted. According to *Webster's Third International Dictionary* (1971), a tax[14] is defined as "a usually pecuniary charge imposed by legislature or other public authority upon persons or property for public purposes; a forced contribution of wealth to meet the public needs of a government." This general definition of the term tax contains no basis for distinguishing between a general tax and a special assessment, nor would any reasonable common understanding of the term in the context of this statute.

The common sense understanding of taxation to include any involuntary exaction to support a governmental entity or purpose is consistent with the intent of Congress expressed in the statute and the legislative record quoted *supra*. Congress sought to conserve the money it appropriated to Amtrak, and to restrict its use to Amtrak operations. It explicitly sought to prevent the diversion of the funds appropriated, to those states and localities for benefit of which Amtrak receives subsidies. To that end, it is clear that the effect on Amtrak of a general tax or a special assessment is the same: the use of funds, intended for

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[14] "Where a federal right is involved, a federal court is not bound by the characterization given to or state tax by a state court nor relieved from the duty of considering the real nature of the tax and its effect on the federal right assessed." *Harford County, supra*, 572 F.Supp. at 242, *citing Carpenter v. Shaw*, 280 U.S. 363, 367-68 (1930); *Allegheny, supra*, 322 U.S. at 184.

Defendant's argument that the assessment is not a tax because it was made pursuant to police power and not taxing power is both incorrect and of no moment. The legislature has essentially authorized the PUC to assess those before it for the funds required to perform its governmental function.

Amtrak operations, for the precise purpose Congress sought to prohibit.

There is no indication in the legislative history that Congress intended any understanding other than the plain meaning of the statute's words. Congress simply did not intend to adopt the hypertechnical construction which the *Decatur* court applied to the Illinois exemption before it. The distinction between state funds created by general taxes and local funds created by special taxes is of no moment here. Section 546b explicitly exempts Amtrak from payment of state and local taxes alike.

In fact, the construction advocated by the Defendants here would be used quite readily, by these defendants and others, to undermine the goal of Congress in enacting the exemption. General taxation, for example on real estate holdings, at least purports to be proportional to the value of the property held. Special assessments, on the other hand, can very easily be discriminatorily applied. In the instant case, 80 percent of the cost of construction was assessed against Tredyffrin Township. That is precisely the amount which the Commonwealth would reimburse Tredyffrin Township under the Billion Dollar Bridge Bill. *See supra* at 4. The only party in this litigation which would be required to bear non-reimbursible expenses is Amtrak. Such discriminatory assessments run precisely counter to the situation Congress sought to foster, even more than non-discriminatory general taxes. They are simply incompatible with Congressional intent as expressed in the exemption and its legislative history.

The understanding of section 546b which I have adopted is further supported by the nature of the relationship between Amtrak and the United States. Amtrak was established by Congress as a United States corporation for

profit. 45 U.S.C. §541. The many goals of Congress in establishing and maintaining Amtrak were set forth in §§501 and 501a. While I will not repeat the findings and goals contained in those sections, it is evident that they manifest a federal commitment to maintain and improve rail passenger service, federal controls over Amtrak management and operations and federal financial support for Amtrak. *See also* Comptroller General, *Report to the Congress of the United States: Alternatives for Eliminating Amtrak's Debt to the Government* 6-12 (March 28, 1980) ("Comptroller General's Report").

The federal government has retained substantial controls over Amtrak's operations. The composition of the board of directors is heavily influenced by the federal government. 45 U.S.C. §543. The Congress exerts systematic influence on Amtrak's route structure, 45 U.S.C. §564; Comptroller General's Report at 7-8, and on other aspects of operations. *See e.g.*, 45 U.S.C. §545(n) (food and beverage service). Amtrak must make regular detailed reports to the United States concerning its operations. 45 U.S.C. §548. Amtrak is also subject to other federal supervision including GAO audits of financial transactions and performance, and controls over Amtrak banking and checking accounts. Comptroller General's Report at 7. Amtrak cannot issue large financial obligations without approval of the Secretary of the Treasury. *Id.* In addition, a very substantial portion of Amtrak's operating budget comes from federal appropriation. *Id.* at 9-11.

The Amtrak enabling legislation provides that Amtrak "will not be an agency or establishment of the United States government." 45 U.S.C. §541. However, federal immunity from state and local taxation extends to instrumentalities of the United States as well as to its agencies. *City of Adair, supra,* 539 F.2d at 1188; *see McCul-*

loch, supra, 17 U.S. (4 Wheat.) at 425-35. "[A] government instrumentality is one that performs an important governmental function." *Metrocentre Improvement District, supra,* 657 F.2d at 185 and n.2.

Whether Amtrak is formally an instrumentality of the United States for the purpose of federal tax immunity,[15] however, is not crucial to this case, because Congress has explicitly enacted Amtrak's tax immunity in section 546b. *Cf. id.* at 186. The extensive federal involvement is Amtrak's managment, finances and operations make it apparent that the legislative exemptions should be liberally construed to effectuate its goals. Section 546b is no mere exemption of an essentially private entity in exchange for some other benefit to the federal government. Rather, it is an attempt to guarantee Amtrak's fiscal integrity, and indeed its survival. The federal government has pursued governmental functions and policies through Amtrak. It would be inappropriate to undermine those goals through the too stingy construction of the exemption offered by defendants.

IV. *Conclusion*

For all of the reasons, I conclude that section 546b exempts Amtrak from the payment of special assessments such as that imposed by the PUC. Judgment will therefore be entered for the plaintiff.

An appropriate order follows.

s/ Clarence C. Newcomer, J.

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[15] I believe that it is. ***But see, Senter v. Amtrak***, 540 F.Supp. (D.N.J. 1982), (Amtrak is not an instrumentality of the United States for the purpose of assessing punitive damages).

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NATIONAL RAILROAD PASSENGER CORPORATION	:	CIVIL ACTION
v.	:	
COMMONWEALTH OF PENNSYLVANIA PUBLIC UTILITY COMMISSION, et al.	:	NO. 86-5357

ORDER

AND NOW, this 30th day of June, 1987, it is hereby Ordered that plaintiff's motion for summary judgment is GRANTED, and defendants' cross-motion for summary judgment is DENIED. Judgment is entered in favor of the National Railroad Passenger Corporation and against the Commonwealth of Pennsylvania Public Utility Commission and the Township of Tredyffrin.

It is further Ordered and Decreed that any assignment of costs to the National Railroad Passenger Corporation under the Pennsylvania Public Utility Commission's Order for design, construction or maintenance of the Cassatt Avenue bridge structures violates 45 U.S.C. §546b, as a tax levied on the National Railroad Passenger Corporation.

It is further Ordered that the Public Utility Commission and Tredyffrin Township are PERMANENTLY ENJOINED from assessing such a tax regarding the Cassatt Avenue bridge on the National Railroad Passenger Corpo-

ration, or enforcing the Pennsylvania Public Utility Commission Order of May 30, 1986 against the National Railroad Passenger Corporation.

AND IT IS SO ORDERED.

s/ Clarence C. Newcomer, J.

PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17120

Public Meeting held May 30, 1986

Commissioners Present:
Linda C. Taliaferro, Chairman
Frank Fischl
Bill Shane

Investigation upon the Commission's own motion into the matters relating to the structural adequacy and load-carrying capacity of the bridge carrying Cassatt Avenue over and above the grade of the tracks of National Railroad Passenger Corporation, partly in the Township of Tredyffrin and partly in the Township of Easttown, all in Chester County, as pertains to the proper service, accomodation, convenience and safety of the traveling public utilizing same.	I-810347

ORDER

BY THE COMMISSION:

We adopt as our action the Recommended Decision of Administrative Law Judge Martin R. Fountain dated April 1, 1986, as amended; THEREFORE,

IT IS ORDERED:

1. That exemption is hereby granted from the vertical clearance requirements of 52 Pa. Code Section §33.121 in that the minimum vertical clearance at the structure measured from the top of the rails to the bottom of the structure will be at least 19′ 3″.

2. That Township of Tredyffrin, at its initial cost and expense, within nine (9) months of the date of service of the Commission's Order, submit metes and bounds descriptions of the railroad property to be appropriated for the project subsequent to which said property will be appropriated in accordance with the provisions of the Public Utility Code, 66 Pa. C.S.A. §2702(b), and directed recorded in the Chester County Courthouse under the name or names of the property owners.

3. That Township of Tredyffrin, within nine (9) months of the date of service of the Commission's order, at its initial cost and expense, prepare and submit to this Commission for review and approval and to all parties of record for examination, a set of detailed construction plans for the construction of the project generally in accordance with the preliminary construction plans submitted at the hearing held in this proceeding January 14, 1986, and marked as Tredyffrin's Exhibit No. 1; the said plans to include a suitable pedestrial protective barrier above the electrified tracks.

4. That Township of Tredyffrin, within twelve (12) months of the date of approval of the final construction plans by the Commission, at its initial cost and expense, furnish all material and do all work necessary to construct the project in accordance with the approved construction plans.

5. That Township of Tredyffrin, at its initial cost and expense, furnish all material and do all work necessary to maintain pedestrian traffic across the tracks generally in accordance with preliminary construction plans submitted at the hearing held in this proceeding.

6. That National Railroad Passenger Corporation, at its initial cost and expense, furnish all material and do all work necessary to alter its facilities, inclusive of the electric lines, as needed, from the area of the crossing in a safe and satisfactory condition; and submit a detailed plan to the Commission for modification to its electrification facilities.

7. That National Railroad Passenger Corporation, at its initial cost and expense, furnish flagmen, watchmen, construction inspectors, engineering services and electrical men, as needed, when the work is being performed at the crossing in accordance with this Order.

8. That Philadelphia Suburban Water Company, at its sole cost and expense, furnish all material and do all work necessary to install a new water line on the structure as requested by it at the hearing held in this proceeding.

9. That Philadelphia Electric Company, at its initial cost and expense, furnish all material and do all work necessary to alter its existing 4" gas main, and install four ducts for its future use in the structure, in a safe and satisfactory condition.

10. That any relocation of, changes in, or removal of any existing structure, equipment or facilities of any public utility other than National Railroad Passenger Corporation, Consolidated Rail Corporation, Southeastern Pennsylvania Transportation Authority, Philadelphia Suburban Water Company and Philadelphia Electric Company, which may

be required as incidental to the construction of the improvement, be made by the said utility at its initial cost and expense in such a manner as will not interfere with the construction of the improvement.

11. That Township of Tredyffrin, Easttown Township, National Railroad Passenger Corporation, Consolidated Rail Corporation, Southeastern Pennsylvania Transportation Authority, Philadelphia Suburban Water Company and Philadelphia Electric Company cooperate with each other so that the operations or facilities of either of the parties will not be endangered or unnecessarily impeded.

12. That National Railroad Passenger Corporation cooperate with the Township of Tredyffrin in reviewing the plans so that the project will not be unnecessarily delayed.

13. That Township of Tredyffrin, at least 20 days prior to the start of work, inform all parties involved when the work will be started at the project, in accordance with this Order.

14. That upon completion of the work ordered performed herein, National Railroad Passenger Corporation, when and as certified by this Commission, pay to Township of Tredyffrin 20% of the actual costs incurred by it in furnishing material and performing work in accordance with Paragraphs, 2, 3, 4 and 5 of this Order.

15. That upon completion of the work ordered performed herein, Township of Tredyffrin, when and as certified by this Commission, pay to National Railroad Passenger Corporation a sum or sums of money equal to 80% of the costs incurred by it in furnishing material and performing work in accordance with Paragraghs 6 and 7 of this Order.

16. That Tredyffrin Township bear the remaining 80% of the costs incurred by it in furnishing material and

performing work in accordance with Paragraphs 2, 3, 4 and 5 of this Order.

17. That National Railroad Passenger Corporation bear the remaining 20% of the costs incurred in furnishing material and performing work in accordance with Paragraphs 6 and 7 of this Order.

18. That upon completion of the work ordered performed herein, Township of Tredyffrin, when and as certified by this Commission, pay to the Philadelphia Electric Company 20% of the costs incurred by it in altering its 4" gas main in accordance with Paragraph 9 of this Order.

19. That Philadelphia Electric Company bear the remaining 80% of the costs incurred by it in altering its 4" gas main and 100% of the costs incurred by it in the installation of four ducts in the structure for its future use in accordance with Paragraph 9 of this Order.

20. That upon completion of the project and its opening to public use, Township of Tredyffrin, at its sole cost and expense, maintain the entire superstructure of the vehicular bridge, including the roadway approach thereto within its boundaries, snow removal from the pedestrian walkway and the hand railing, fences and protective barriers on the walkway within its boundaries, all in a safe and satisfactory condition.

21. That upon completion of the project and its opening to public use, Township of Easttown, at its sole cost and expense, maintain the roadway approach to the vehicular structure within its boundaries, including snow removal from the pedestrian walkway along with hand railing, fences and protective barriers on the walkway within its boundaries, all in a safe and satisfactory condition.

22. That upon completion of the project and its opening to public use, National Railroad Passenger Corporation, at its sole cost and expense, furnish all material and

do all work necessary to maintain the substructure of the vehicular bridge, sub and superstructure of the pedestrian walkway except snow removal, hand rails, fences and barriers assigned to the Townships, as well as the stairs to the train station and the hand railing installed thereat, all in a safe and satisfactory condition.

23. That upon completion of the project and its opening to public use, the railroads and the non-transportation utilities involved in this proceeding, each, at its sole cost and expense, furnish all material and do all work necessary to maintain its respective facilities at the crossing in a safe and satisfactory condition.

24. That upon completion of the project and its opening to public use, Township of Tredyffrin, at its sole cost and expense, remove the vehicular detours established previously for the crossing.

25. That the costs incurred by National Railroad Passenger Corporation and Township of Tredyffrin in furnishing material and performing work in accordance with the previous orders of the Commission issued in this proceeding, be borne by the respective parties.

26. That this Order, insofar as it assigns the costs of the project to the parties involved, is without prejudice to their right to recover the said costs from others in accordance with any lawful agreements between the parties.

BY THE COMMISSION
s/ Jerry Rich
Secretary

(SEAL)

ORDER ADOPTED: May 30, 1986

ORDER ENTERED: (illegible)

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Investigation upon the Commission's own motion into the matters relating to the structural adequacy and load-carrying capacity of the bridge carrying Cassatt Avenue over and above the grade of the tracks of National Railroad Passenger Corporation, partly in the Township of Tredyffrin and partly in the Township of Easttown, all in Chester County, as pertains to the proper service, accommodation, convenience and safety of the traveling public utilizing same.	:	Docket Number I-810347

RECOMMENDED DECISION

Before
Martin R. Fountain
Administrative Law Judge

HISTORY OF PROCEEDING

The investigation in this proceeding, instituted by the Commission on April 18, 1981, concerns the structure carrying a township road known as Cassatt Avenue over the tracks of National Railroad Passenger Corporation (Amtrak). Several orders have been issued in the proceeding. The latest order was issued NISI on November 16, 1984, in which Township of Tredyffrin was directed, at its initial cost and expense, to prepare preliminary construc-

tion plans for the replacement of the structure. Upon completion of the plans, a further hearing was ordered held for the consideration of plans, allocation of costs and the resolution of any other issues involved.

The hearing in the case was held on January 14, 1986, before the undersigned Administrative Law Judge (ALJ). The record produced 114 pages of testimony and a total of 5 exhibits. No Briefs or Reply Briefs have been filed by any of the parties.

FINDINGS OF FACT

1. Tredyffrin Township's Exhibit No. 1 is a set of preliminary construction plans prepared by Huth Engineers for the replacement of the structure.

2. The Township is willing to prepare the final construction plans for the project (N.T. 98, 99).

3. Preparation of final construction plans may take one year depending upon Amtrak's review of plans (N.T. 109).

4. Reconstruction of the structure is estimated to cost $556,000 (Tredyffrin Township Exhibit 3). The design is expected to cost an additional $70,390 (N.T. 106).

5. The project is listed on the so-called Billion Dollar Bridge Bill for construction. The amount allocated is $340,000 for construction and $60,000 for design. Bridge Bill funds can be used for 80% of the project costs (Act 1984—161, N.T. 133).

6. The Township wants 20% matching costs allocated to the railroad entities (N.T. 99, 100).

7. It will take 12 months to complete the construction of the structure (N.T. 101).

8. Some railroad property needs to be appropriated for the project (N.T. 97).

9. The structure is closed to vehicular traffic. No vehicular detours will be required (N.T. 101).

10. Pedestrian traffic will be maintained across the tracks during construction (N.T. 101).

11. Tredyffrin Township agrees to maintain the roadway and walkway surfaces on the bridge (N.T. 100).

12. Tredyffrin Township has applied for Bridge Bill funds. It has entered into an agreement with PennDOT for the disbursement of the funds (N.T. 103, Tredyffrin Township Exhibit 2).

13. Amtrak has communication and signal, and electrification facilities attached to the structure. Amtrak will do the work relating to the alteration of its facilities (N.T. 113, 114).

14. Amtrak does not agree to bear any of the project costs (N.T. 116).

15. It will be necessary to provide flagmen, watchmen and railroad inspectors during construction (N.T. 116).

16. Conrail owns no tracks or facilities at the crossing. It operates trains over the tracks for a monetary consideration to Amtrak (N.T. 121).

17. Conrail is not willing to do any work or bear any costs (N.T. 121, 122).

18. SEPTA has a lease with Amtrak for the train station known as Berwyn Station. It wants stairs, platform lighting, parking lots, etc. that may be disturbed by the improvement replaced (N.T. 126, 127).

19. SEPTA does not agree to do any work or bear any costs (N.T. 128).

20. SEPTA is concerned with the pedestrians utilizing the crossing. It owns two parking lots in the area for its patrons (N.T. 130).

21. Easttown Township does not agree to do any work or bear any costs (N.T. 132, 134).

22. Easttown Township agrees to maintain the portion of the bridge and the roadway approach located within Easttown Township (N.T. 132).

23. Chester County does not agree to bear any costs for the project (N.T. 142).

24. Chester County does not receive any liquid fuel monies for the bridge (N.T. 147).

25. PennDOT does not agree to do any work or bear any costs (N.T. 150-153).

26. PennDOT is just acting as a conduit in disbursing Bridge Bill funds to Tredyffrin Township (N.T. 154).

27. Philadelphia Suburban Water Company has no facilities within the limits of the proposed work. It would like to install an 8″ water main in a 12″ casing on the structure, at its sole cost and expense (N.T. 171).

28. Philadelphia Electric Company has a 4″ steel gas main on the structure. It also has electrical aerial distribution facilities and a 33,000-volt transmission facility in the area (N.T. 173).

29. The gas main will be relocated in an 8″ casing beneath the sidewalk of the new structure. No changes to the aerial electrical facilities are anticipated (N.T. 173, 174).

30. Philadelphia Electric wants four ducts installed on the structure in conjunction with the relocated gas main for future use (N.T. 174).

31. In 1977, 4" gas main was replaced in the roadway approaches under permit and the structure section under a 1907 agreement with PRR (N.T. 174, 175; P.E. Exh. 2).

32. Anticipated service life of the gas main is estimated to be 55 years (N.T. 175).

33. Placing Philadelphia Electric's gas main under the railroad tracks will involve significant expense (N.T. 176).

DISCUSSION

The central issue in this proceeding pertains to the construction of the structure and the allocation of costs related thereto. Tredyffrin Township, in accordance with the Commission's order, has prepared preliminary construction plans for the reconstruction of the structure. It is willing to prepare the final construction plans and construct the structure at its initial cost and expense. The Township is not willing to bear the design or construction costs and states that the costs should be allocated under the provisions of the Billion Dollar Bridge Bill.

There are funds available under this Bill for the reconstruction of the structure. The amount allocated for construction is $540,000 and $60,000 for design. Tredyffrin Township has entered into an agreement with PennDOT for the disbursement of the Bridge Bill funds. PennDOT states that such are not PennDOT's funds and that it is only acting as a conduit in the disbursement thereof.

Construction cost of the project is estimated to be $556,000; the design is estimated to cost an additional

$70,390. Bridge Bill funds can be used for paying 80% of the project costs. Tredyffrin Township states that the matching 20% of the costs should be allocated to the railroad entities because they will be relieved of substantial short term and long term liabilities.

The railroads involved are Amtrak, Conrail and SEPTA. Amtrak is the owner and operator of the rail line. There are four tracks located under the structure; 104 passenger trains and 28 Conrail freight trains are operated at this location at speeds of up to 70 miles and 50 miles per hour respectively. Of the 104 passenger trains, 71 are SEPTA commuter trains and 33 are Amtrak trains. Amtrak trains do not stop at the Berwyn train station located nearby (N.T. 87, hearing of July 21, 1981). Conrail owns no tracks or facilities at the crossing. It operates its trains over the line for a consideration of payment to Amtrak. Neither does SEPTA own tracks at the crossing. It, too, apparently, has an agreement with Amtrak concerning the operation of trains. Berwyn train station is leased by SEPTA from Amtrak. SEPTA does own two parking lots near the station for its patrons.

None of the railroads agrees to do any structure work or bear any of the project costs. Amtrak states that the costs should be borne by the highway interests who will benefit most from the new crossing.

The structure was built in 1899-1900 by the Philadelphia Division of the Pennsylvania Railroad Company. It was maintained by the Pennsylvania Railroad in the past (N.T. 89, 90, 91, hearing of July 21, 1981). Amtrak, the present owner of the tracks, has not maintained the structure on its own.

Preparation of final construction plans and the construction of the project is not the issue. Tredyffrin Town-

ship is willing to undertake the design and construction at its initial cost and expense. It, reluctantly, will be allowed to proceed with the preparation of final plans and the construction of the project. The reason for the reluctance is the roadway approach grades proposed by the Township. Preliminary construction plans submitted at the hearing show roadway approach grades for south and north to be 16.34% and 15% respectively. Such high approach grades are not desirable; however, it seems that, because of the proximity of the tracks to Traffic Route 30 and the existing vertical clearance which is being maintained, there is not much that can be done to improve the southern approach grade, although it may have been possible to improve the northern approach grade to some extent (see preliminary plans submitted by the Township). The Township will be given nine months to prepare the final plans and 12 months to complete the construction of the project.

There is a question in the mind of the ALJ about the aluminum protective barriers proposed to be installed at the structure above the electrified tracks. Sheet 1 of 3 of the preliminary plans submitted by the Township shows a hand railing type barrier above the tracks. Surely, the Township could not be thinking of installing such a barrier at this location, since it must be of the type specified by PennDOT for pedestrian walkways above electrified tracks and of the type acceptable to Amtrak. The Township should make sure that an appropriate type of barrier is installed at this location.

Costs of the project will be assigned as follows; Tredyffrin Township will be directed to bear 80% of the costs which are recoverable through Bridge Bill funds. Amtrak will be assigned the remaining 20% of the costs. There are compelling reasons for assigning all the matching costs to

Amtrak: The structure was built and maintained by the railroads; Amtrak is the present owner of the rail line; and there are a very large number of high speed trains operated at this location. Amtrak, therefore, has major involvement in the case and should bear a fair share of the costs.

No costs will be assigned to SEPTA or Conrail because they are not the owners of the line, paying Amtrak for the privilege of the use of the tracks.

The non-transportation utilities involved in the case are Philadelphia Suburban Water Company and Philadelphia Electric Company. Philadelphia Suburban has no facilities in the area but wants to install an 8" water line in a 12" casing on the structure, at its sole cost and expense. Such request is reasonable and allowable. Philadelphia Electric has a 4" gas line on the structure, installed in 1907, by agreement with Pennsylvania Railroad. The line was replaced in 1977 and will have to be relocated to the new structure. Service life of the line is expected to be 55 years. Philadelphia Electric also wants to install four ducts on the structure in conjunction with the alteration of the gas line for its future use. The ALJ has no objection to the installation of the new ducts; however, since the ducts are for Philadelphia Electric's own use, it should bear the costs involved. Regarding the relocation of the 4" gas main, Tredyffrin Township will be directed to reimburse Philadelphia Electric 20% of the cost involved, with the utility absorbing the remaining 80%, since the gas line was relatively recently replaced.

Prior to assigning maintenance of the structure, it must be pointed out that technically there are two structures proposed to be built in place of the one now existing; one for vehicular traffic; and the other for pedestrian traffic

(see Tredyffrin's Exhibit 1). The pedestrian bridge is proposed to be built first; the vehicular bridge will then be built next to the pedestrian bridge. Maintenance of the vehicular structure will be divided between Amtrak and the Townships. Amtrak will be directed to maintain the substructure of the vehicular bridge. However, since the pedestrian walkway is almost exclusively for the use of railroad patrons, its maintenance, both the sub and superstructure, will be assigned to Amtrak, except for snow removal from the walkway and the maintenance of the railings, protective barrier and fences on the walkway, which will be assigned to the Township in whose boundaries the walkway lies. Amtrak will also be assigned maintenance of the stairways. Tredyffrin Township will be directed to maintain the superstructure of the vehicular bridge. Easttown Township is not being assigned any responsibility for the main superstructure because the structure does not seem to lie in Easttown Township (N.T. 33, 40—Hearing of July 21, 1981). Roadway approaches to the structure will be ordered maintained by the respective Townships. In the event Amtrak seeks to recover some of its costs from SEPTA, lessee of the train station, the ALJ would have no objections.

Other issues should be addressed at this point: One concerns the appropriation of railroad property for the project. Tredyffrin Township states that some of the railroad's right-of-way is needed. However, it has not supplied metes and bounds descriptions of the property. The Township should supply the appropriate descriptions to the Commission, so that the property can be appropriated prior to construction. Amtrak will be directed to bear the cost of right-of-way damages, if any.

Amtrak has incurred some costs in the preparation of an in-depth inspection report in accordance with the

Commission's Order issued March 18, 1983. The costs incurred are not known. Amtrak will be directed to bear such costs. Tredyffrin Township also has incurred some costs in the preparation of preliminary plans in accordance with the Commission's Order issued Nisi October 16, 1984. It, too, will be directed to bear such costs. If Township seeks to recover those costs from the Commonwealth or others, the ALJ would have no objections in such an event.

ORDER

THEREFORE,

IT IS ORDERED (Subject to Commission Approval):

1. That exemption is hereby granted from the vertical clearance requirements of 52 Pa. Code Section §33.121 in that the minimum vertical clearance at the structure measured from the top of the rails to the bottom of the structure will be at least 19' 3".

2. That Township of Tredyffrin, at its initial cost and expense, within (9) months of the date of service of the Commission's Order, submit metes and bounds descriptions of the railroad property to be appropriated for the project subsequent to which said property will be appropriated in accordance with the provisions of the Public Utility Code, 66 Pa. C.S.A. §2702(b), and directed recorded in the Chester County Courthouse under the name or names of the property owners.

3. That Township of Tredyffrin, within nine (9) months of the date of service of the Commission's Order, at its initial cost and expense, prepare and submit to this Commission for review and approval and to all parties of record for examination, a set of detailed construction plans for the construction of the project generally in accordance

with the preliminary construction plans submitted at the hearing held in this proceeding January 14, 1986, and marked as Tredyffrin's Exhibit No. 1; the said plans to include a suitable pedestrian protective barrier above the electrified tracks.

4. That Township of Tredyffrin, within twelve (12) months of the date of approval of the final construction plans by the Commission, at its initial cost and expense, furnish all material and do all work necessary to construct the project in accordance with the approved construction plans.

5. That Township of Tredyffrin, at its initial cost and expense, furnish all material and do all work necessary to maintain pedestrian traffic across the tracks generally in accordance with preliminary construction plans submitted at the hearing held in this proceeding.

6. That National Railroad Passenger Corporation, at its initial cost and expense, furnish all material and do all work necessary to alter its facilities, inclusive of the electric lines, as needed, from the area of the crossing in a safe and satisfactory condition.

7. That National Railroad Passenger Corporation, at its initial cost and expense, furnish flagmen, watchmen, construction inspectors, engineering services and electrical men, as needed, when the work is being performed at the crossing in accordance with this Order.

8. That Philadelphia Suburban Water Company, at its sole cost and expense, furnish all and do all work necessary to install a new water line on the structure as requested by it at the hearing held in this proceeding.

9. That Philadelphia Electric Company, at its initial cost and expense, furnish all material and do all work nec-

essary to alter its existing 4" gas main, and install four ducts for its future use in the structure, in a safe and satisfactory condition.

10. That any relocation of, changes in, or removal of any existing structure, equipment or facilities of any public utility other than National Railroad Passenger Corporation, Consolidated Rail Corporation, Southeastern Pennsylvania transportation Authority, Philadelphia Suburban Water Company and Philadelphia Electric Company, which may be required as incidental to the construction of the improvement, be made by the said utility at its initial cost and expense in such a manner as will not interfere with the construction of the improvement.

11. That Township of Tredyffrin, Easttown Township, National Railroad Passenger Corporation Consolidated Rail Corporation, Southeastern Pennsylvania Transportation Authority, Philadelphia Suburban Water Company and Philadelphia Electric Company cooperate with each other so that the operations or facilities of either of the parties will not be endangered or unnecessarily impeded.

12. That National Railroad Passenger Corporation cooperate with the Township of Tredyffrin in reviewing the plans so that the project will not be unnecessarily delayed.

13. That Township of Tredyffrin, at least 20 days prior to the start of work, inform all parties involved when the work will be started at the project, in accordance with this Order.

14. That upon completion of the work ordered performed herein, National Railroad Passenger Corporation when and as certified by this Commission, pay to Township of Tredyffrin 20% of the actual costs incurred by it in

furnishing material and performing work in accordance with Paragraphs 2, 3, 4 and 5 of this Order.

15. That upon completion of the work ordered performed herein, Township of Tredyffrin, when and as certified by this Commission, pay to National Railroad Passenger Corporation a sum or sums of money equal to 80% of the costs incurred by it in furnishing material and performing work in accordance with Paragraphs 6 and 7 of this Order.

16. That Tredyffrin Township bear the remaining 80% of the costs incurred by it in furnishing material and performing work in accordance with Paragraphs 2, 3, 4 and 5 of this Order.

17. That National Railroad Passenger Corporation bear the remaining 20% of the costs incurred in furnishing material and performing work in accordance with Paragraphs 6 and 7 of this Order.

18. That upon completion of the work ordered performed herein, Township of Tredyffrin, when and as certified by this Commission, pay to the Philadelphia Electric Company 20% of the costs incurred by it in altering its 4" gas main in accordance with Paragraph 9 of this order.

19. That Philadelphia Electric Company bear the remaining 80% of the costs incurred by it in altering its 4" gas main and 100% of the costs incurred by it in the installation of four ducts in the structure for its future use in accordance with paragraph 9 of this Order.

20. That upon completion of the project and its opening to public use, Township of Tredyffrin, at its sole cost and expense, maintain the entire superstructure of the vehicular bridge, including the roadway approach thereto within its boundaries, snow removal from the pe-

destrian walkway and the hand railing, fences and protective barriers on the walkway within its boundaries, all in a safe and satisfactory condition.

21. That upon completion of the project and its opening to public use, Township of Easttown, at its sole cost and expense, maintain the roadway approach to the vehicular structure within its boundaries, including snow removal from the pedestrian walkway along with hand railing, fences and protective barriers on the walkway within its boundaries, all in a safe and satisfactory condition.

22. That upon completion of the project and its opening to public use, National Railroad Passenger Corporation, at its sole cost and expense, furnish all material and do all work necessary to maintain the substructure of the vehicular bridge, sub and superstructure of the pedestrian walkway except snow removal, hand rails, fences and barriers assigned to the Townships, as well as the stairs to the train station and the hand railing installed thereat, all in a safe and satisfactory condition.

23. That upon completion of the project and its opening to public use, the railroads and the non-transportation utilities involved in this proceeding, each, at its sole cost and expense, furnish all material and do all work necessary to maintain its respective facilities at the crossing in a safe and satisfactory condition.

24. That upon completion of the project and its opening to public use, Township of Tredyffrin, at its sole cost and expense, remove the vehicular detours established previously for the crossing.

25. That the costs incurred by National Railroad Passenger Corporation and Township of Tredyffrin in furnishing material and performing work in accordance with

the previous orders of the Commission issued in this proceeding, be borne by the respective parties.

26. That this Order, insofar as it assigns the costs of the project to the parties involved, is without prejudice to their right to recover the said costs from others in accordance with any lawful agreements between the parties.

Date: 4/1/86

s/ MARTIN R. FOUNTAIN
Administrative Law Judge

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No. 88-398

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

COMMONWEALTH OF PENNSYLVANIA,
PUBLIC UTILITY COMMISSION,
Petitioner,

v.

NATIONAL RAILROAD PASSENGER CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

PETER S. CRAIG *
DENNIS M. MOORE
NATIONAL RAILROAD
PASSENGER CORPORATION
400 North Capitol Street, N.W.
Washington, D.C. 20001
(202) 383-3259
Attorneys for Respondent

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether, as the Court of Appeals held, the reference to "any taxes or other fees imposed by any State" in 45 U.S.C. § 546b embraces special assessments for local public improvements.

PARTIES

The parties to the proceedings below included the parties named in the caption of this case and the Township of Tredyffrin.*

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* National Railroad Passenger Corporation ("Amtrak") is a corporation chartered under the laws of the District of Columbia in accordance with section 301 of the Rail Passenger Service Act, 45 U.S.C. § 541. Amtrak is not a subsidiary of any other corporation. Amtrak owns 100% of the capital stock of the Chicago Union Station Company and the Washington Terminal Company.

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IN THE

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COMMONWEALTH OF PENNSYLVANIA,
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NATIONAL RAILROAD PASSENGER CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

Respondent National Railroad Passenger Corporation ("Amtrak") respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the opinion of the Third Circuit Court of Appeals in this case. That opinion is reported at 848 F.2d 436.

ARGUMENT

The Court of Appeals correctly affirmed the district court and correctly held that 45 U.S.C. § 546b, exempting Amtrak from "any taxes or other fees", included immunity from assessments for local public improvements. The court's holding does not conflict with any decision of this Court or with any decision of other courts of appeals. The case does not warrant this Court's review.

1. The Lower Courts Correctly Construed the Statute.

Petitioner quarrels with the way the Court of Appeals interpreted the governing statute, 45 U.S.C. § 546b. (Pet., 11-19) That quarrel is misplaced.

Petitioner argues that Amtrak is not a "federal instrumentality."[1] This, however, overlooks the fact that Congress has the undoubted authority to create corporations and to protect their operations by the grant of immunity from state and local taxation. *Pittman v. Home Owners' Corp.*, 308 U.S. 21, 32-33 (1939). It did so as to Amtrak. *National R.R. Passenger Corp. v. New Castle County*, 633 F.Supp. 354, 360 (D. Del. 1986).

Cases construing the scope of such federally-granted tax immunities uniformly recognize that special assessments for local improvements are, indeed, "taxes." The leading case is *Federal Reserve Bank of St. Louis v. Metrocentre Improvement District No. 1*, cited in both of the opinions below, where this Court summarily affirmed the decision by the Eighth Circuit, 657 F.2d 183, 186 (8th Cir. 1981), *aff'd*, 455 U.S. 995 (1982). In that case the Federal Reserve Bank was held to be exempt from a special assessment for a central business district improvement project in downtown Little Rock, Arkansas.

Other decisions are in accord. *Red River Levee District No. 1 v. Reconstruction Finance Corp.*, 170 F.2d 430 (8th Cir. 1948) (RFC held exempt from special assess-

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[1] It has been settled law for over a century that the federal government and its instrumentalities are exempt from state and local assessments for local improvements. *See, e.g., Van Brocklin v. Anderson*, 117 U.S. 151, 162 (1886); *Wisconsin Central R.R. v. Price County*, 133 U.S. 496, 504 (1890); *Mullen Benevolent Corp. v. United States*, 290 U.S. 89, 91 (1933); *Lee v. Osceola & Little River Road Improvement District*, 268 U.S. 643, 645 (1925). As noted by the court below (Pet. App. 10a), the expressed intent of Congress in enacting 45 U.S.C. § 546b was to make Amtrak exempt from taxes "to the same extent as the United States."

ment for flood control project); *United States v. City of Adair*, 539 F.2d 1185, 1189 (8th Cir. 1976), *cert. denied*, 429 U.S. 1121 (1977) (Commodity Credit Corporation held exempt from special assessment for unspecified local improvement); *Federal Reserve Bank of St. Louis v. City of Memphis*, 515 F.Supp. 63, 64 (W.D. Tenn. 1979), *aff'd* 649 F.2d 462 (6th Cir. 1981) (Federal Reserve Bank held exempt from special assessment for central city improvement district).

We are not aware of any decision by this Court or any court of appeals holding that special assessments for local improvements are not "taxes" within the meaning of federal statutes. Certainly, at least, Petitioner has not cited any. Moreover, as is shown by the exhaustive analysis of the legislative history of 45 U.S.C. § 546b undertaken by the courts below, it is manifest that Congress meant exactly what it said when it exempted Amtrak from "any taxes or other fees" imposed by any State, political subdivision of a State, or local taxing authority. The object of such taxes is immaterial; *all* have been prohibited.

2. No "Conflict in Federal Policy" Results From the Decisions Below

Unable to cite any conflict between the opinion below and previous decisions by this Court or other circuit courts, the Petitioner alleges that the decision below results in a "conflict in Federal policy," citing various Federal-aid statutes relating to repair or replacement of highway bridges over railroads. (Pet., 8-11)

The contrary is true. In addition to exempting Amtrak from any state or local taxes or other fees, Congress has directed the Secretary of Transportation to limit assessments against railroads for the costs involved in the elimination of hazards of railroad-highway crossings to the "net benefit" they derive, but in no event more than ten percent. 23 U.S.C. § 130(b). Pursuant to this di-

rective, the Secretary of Transportation has issued regulations, 23 C.F.R. § 646.210 (1988), reading in relevant part:

> (a) State laws requiring railroads to share in the cost of work for the elimination of hazards at railroad-highway crossings shall not apply to Federal-aid projects.
>
> (b) Pursuant to 23 U.S.C. 130(b) * * * (2) Projects for the reconstruction of existing grade separations are deemed to generally be of no ascertainable net benefit to the railroad and there shall be no required share of their costs, unless the railroad has a specific contractual obligation with the State or its political subdivision to share in the costs.

In the past, as in this case, the Pennsylvania Commission has sought to avoid the policies of federal law by using Amtrak as a secondary (and involuntary) source of federal aid on highway projects of insufficient importance to qualify for regular federal-aid highway funds. The effect of the decision below is to shut the door on this effort to circumvent federal policy.

Among the many states in which Amtrak operates, the Commonwealth of Pennsylvania stands alone in claiming the right to tax Amtrak for local public improvements. Other states have accepted and followed the decision by Judge Newcomer in 665 F.Supp. 402 (E.D.Pa. 1987), which was affirmed by the opinion below.

CONCLUSION

Further review by this Court is not warranted. The petition for a writ of certiorari should be denied.

Respectfully submitted,

PETER S. CRAIG *
DENNIS M. MOORE
NATIONAL RAILROAD
PASSENGER CORPORATION
400 North Capitol Street, N.W.
Washington, D.C. 20001
(202) 383-3259
Attorneys for Respondent

September, 1988

* Counsel of Record